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WASTE MANAGEMENT COUNCIL

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REGENESIS CORPORATION)	
1994 Maple Street)	
West Hopkinton, NH 03229)	
)	WMC NO. <u>05- 11 WMC</u>
)	
)	APPEAL OF LICENSE
)	REVOCATION
)	
Re: Solid Waste Permit No. DES-SW-SP-002)	DES DOCKET NO. 04-010
Bio Energy Solid Waste Facility)	
West Hopkinton)	
)	
)	
_____)	

NOTICE OF APPEAL
BY CITIZENS FOR A FUTURE NEW HAMPSHIRE

Citizens for a Future New Hampshire ("CFNH"), by its Attorneys, Anderson & Kreiger, LLP, pursuant to RSA 21-O:9, RSA 21-O:14 and the New Hampshire Code of Administrative Rules Env-WMC Part 203, hereby appeals the "Decision on Proposed Revocation of Solid Waste Permit," issued by Presiding Officer Michael J. Walls of the New Hampshire Department of Environmental Services ("DES") on June 23, 2005 (the "Decision," Exhibit A hereto). In the Decision, Presiding Officer Walls properly revoked Solid Waste Permit No. DES-SW-SP-002 (the "Permit") on certain grounds, yet he erroneously failed to revoke on a more serious ground – i.e. Bio Energy/Regenesis' lack of reliability and integrity. This leaves open the possibility of Regenesis officials' reapplying for a solid waste permit and potentially operating a facility that will involve the transport, storage, incineration and generation of thousands of tons of solid waste containing hazardous material and that will be the largest source of lead emissions to the air in New Hampshire – posing a significant threat to public health and the environment.

Presiding Officer Walls also erred in concluding that Bio Energy and/or Regenesys provided proper notice to the public pursuant to Env-Wm 303.05(d) in connection with their solid waste permit applications when they sent notices to their corporate affiliates and not to abutters to those affiliates. To the extent this conclusion may have any preclusive effect in the future, it will deprive the public (including CFNH members) of a valuable and statutorily mandated mechanism for being informed of licensing-related activities at the Bio Energy facility.

**STATEMENT OF RELIEF SOUGHT
AND STATUTORY AUTHORITY**

Through this appeal, CFNH respectfully requests that the Waste Management Council, pursuant to its authority under RSA 21-O:9, V and RSA 21-O:14 and other applicable law cited herein, issue an Order:

1. Declaring that Regenesys' officials lack sufficient reliability and integrity to operate a solid waste facility, pursuant to RSA 149-M:9, IX(a) – constituting an additional, independent ground for revocation of the Permit pursuant to Env-Wm 306.05(c) with preclusive effect upon future applications, based on the evidence presented in the underlying proceedings or, if more is needed, on additional relevant evidence that Presiding Officer Walls erroneously precluded the discovery or presentation of through various erroneous evidentiary rulings;
2. Declaring that Bio Energy and/or Regenesys did not provide proper public notice pursuant to Env-Wm 303.05(d) in connection with their solid waste permit applications when they sent notices to corporate affiliates and not to abutters to such corporate affiliates;

3. Amending the Decision in accordance with the above-referenced declarations and revoking the Permit upon the additional ground that Regenesys' officials lacks sufficient reliability and integrity to operate a solid waste facility; and
4. Providing such other relief as is just and proper.

STATEMENT OF FACTS

I. 2002 Solid Waste Permit and DiNapoli's Felony Conviction

Since 1983, Bio Energy LLC (including its predecessor, Bio Energy Corp. a/k/a Bio Energy Corporation) has operated a wood incinerator facility in West Hopkinton (the "Facility"). The Facility has burned wood chips and produced electricity and steam. Decision, p. 40, ¶ 1.

On October 9, 2001, Bio Energy Corp. submitted to the New Hampshire Department of Environmental Services (the "Department" or "DES") an application for a permit to construct and operate a solid waste facility to utilize up to 50% processed wood chips, including chips derived from construction and demolition debris treated with paints and other materials that emit lead, mercury, and other harmful or toxic chemicals when burned. Decision, p. 41, ¶¶ 2 and 3.

On October 18, 2001, Antonio D. DiNapoli – a director, officer and shareholder (owning 50%) of Bio Energy Corp. – was indicted in Hillsborough County Superior Court for witness tampering, a felony. Decision, p. 42, ¶ 7. On March 25, 2002, DiNapoli was found guilty of witness tampering after trial by jury in the Hillsborough County Superior Court, Northern District (Barry, J.). Decision, p. 44, ¶ 15. Witness tampering is a felony. RSA 641: 5. On May 16, 2003, the New Hampshire Supreme

Court affirmed the conviction. State of New Hampshire v. Antonio DiNapoli, 149 N.H. 514 (2003). Decision, p. 44, ¶ 15.

On April 10, 2002, Bio Energy Corp. filed additional information with DES in support of its solid waste application. Decision, p. 44, ¶ 17. However, it did not disclose Mr. DiNapoli's conviction or attach any compliance statement warranting a permit notwithstanding that conviction. Decision, p. 45, ¶ 17.

On May 28, 2002, DES issued Solid Waste Permit No. DES-SW-SP-002 ("the Permit" or "2002 Permit") to Bio Energy Corp., without knowledge of Mr. DiNapoli's felony conviction. Decision, p. 45, ¶ 18. The 2002 Permit referred to Bio Energy Corp.'s October 9, 2001 application and supplemental submittal received April 12, 2002. Decision, p. 45, ¶ 19. The April 12 submittal post-dated DiNapoli's felony conviction, but did not disclose it.

II. June, 2002 Sale of Facility to Bio Energy LLC

On June 12, 2002, only several days after receiving the 2002 Permit and without having obtained prior approval from the DES for a Type IV Modification (as required by Env-Wm 315.02(f) and 315.03), Bio Energy Corp. sold the Facility, the underlying property, and all permits, including the 2002 Permit, to Bio Energy LLC (the "LLC"). Intervenor's Exs. 41-42; Decision, pp. 46-47, ¶¶ 22-24. Bio Energy LLC was to continue as the owner and operator of the Facility, with the same owners, officers, directors, and employees; Mr. DiNapoli and Mr. Dell'Orfano were each 50% members/owners of Bio Energy LLC. Decision, p. 47, ¶ 25. This transaction was executed so that Messrs. DiNapoli and Dell'Orfano could dissolve Bio Energy Corp. and thereby reap certain tax benefits. Decision, p. 47, ¶ 25.

On or about July 5, 2002, Bio Energy Corp. served a notice of filing of a Type IV permit modification application relating to the transfer of the Facility from Bio Energy Corp. to Bio Energy LLC. Decision, pp. 51, ¶ 35. However, after circulating this Notice, Bio Energy decided not to file the application, having realized that it would have to disclose DiNapoli's conviction and that such disclosure would create problems with the Permit transfer. Decision, pp. 51-52, ¶¶ 36-37. Rather than seeking DES' approval of the transfer from Bio Energy Corp. to Bio Energy LLC as required, or even discussing the situation with DES, Dell'Orfano and Smith instead let the notice lapse and orchestrated a corporate shell game aimed at circumventing their obligations to disclose the conviction. Decision, p. 51-52, ¶¶ 36-37.

Bio Energy Corp. was dissolved and liquidated in August, 2002. Decision, p. 55, ¶ 41.

III. December 2002 Type IV Transfer Application

On December 11, 2002, Bio Energy Corp., Bio Energy LLC, and Regenesis Corporation, filed with DES an application to transfer the solid waste Permit to Regenesis (the "Transfer Application"), another company owned by Dell'Orfano that had not yet even qualified to do business in New Hampshire. Decision, pp. 56, 60-61, ¶¶ 43 and 54. All three corporations gave the same mailing address of 1994 Maple Street, West Hopkinton, NH 03229, and the check that accompanied the application was from a Bio Energy LLC account. Corporate officials represented to DES and the Attorney General's ("AG") office that the four individuals who would be required to complete Personal History Disclosure Forms had already completed the forms in connection with the previous Bio Energy background investigation. Decision, p. 56, ¶ 43. With the

exception of Mr. DiNapoli, the officers and directors of Regenesi Corporation were the same as the officers and directors of Bio Energy. Id. It falsely identified Bio Energy LLC's role as being merely the property owner – although Bio Energy LLC was and continued to be the owner and operator of the Facility well beyond issuance of the requested Permit Modification in 2003. Decision, pp. 48-49, 55, 60-61, ¶¶ 28, 42 and 55.

On the Transfer Application, Mr. Dell'Orfano signed, on behalf of both Bio Energy Corp. and Regenesi – the purported existing permittee and the purported proposed permittee – the compliance certification required under Env-Wm 303.14. Decision, p. 56, ¶ 44. This included certification that none of the existing or proposed permittees' officers or directors and no individuals having managerial, supervisory or substantial decision-making authority and responsibility for the management of Facility operations had been convicted of a felony during the five years before the date of the application. Id. Mr. Dell'Orfano did not circle any of the statements on either certification as untrue; nor did he attach Compliance Reports or explanations. Id. Mr. Dell'Orfano's certifications were false as to Bio Energy Corp. and Bio Energy LLC due to DiNapoli's conviction earlier in 2002. Decision, pp. 68-70.

The Transfer Application also included many other false and/or misleading statements and omissions. For example, nowhere on the Transfer Application, and at no point during the application process, did Bio Energy or Regenesi officials inform the DES solid waste program that Bio Energy LLC was and would continue to be the owner and operator of the Facility, that Mr. DiNapoli had resigned from Bio Energy Corp, that Bio Energy Corp. had been dissolved, that all other environmental permits associated with the Facility were held by the LLC, or that Regenesi was not licensed to conduct

business in New Hampshire until January 21, 2003. Nor did they disclose that Mr. DiNapoli had been convicted of a felony, was a member of the LLC, held 50% of the LLC's debt or equity, stood to profit from the Facility's operations in direct relation to Regenesis' profits and retained significant authority over the Facility operations, including matters of environmental compliance. Decision, pp. 57-58, ¶¶ 45-50.

The Transfer Application and related communications from Bio Energy and Regenesis officials to the DES and AG Office also falsely characterized the existing and future role of Bio Energy LLC with respect to the Facility as the mere property owner. However, in all contexts other than the solid waste contexts, the company officials represented that Bio Energy LLC was and would continue to be the owner and operator of the Facility. Decision, pp. 60-61, ¶ 55.

IV. 2003 Type IA Permit Modification

On or about February 14, 2003, Regenesis Corporation applied for a Type IA Modification to the Permit ("Type IA Modification Application"), seeking authority to burn 100% processed construction and demolition wood, instead of 50%. Decision, pp. 62-63, ¶ 57. The Type IA Modification Application contained many of the same false and/or misleading representations and omissions – perpetuating the corporate shell game and pattern of information manipulation. Id.

The public hearing on the Type IA Modification Application was held on May 22, 2003, without the benefit of complete applications, accurate information related to, among other things, the roles of the various entities owned by Messrs. DiNapoli and Dell'Orfano, information regarding Mr. DiNapoli's conviction, a compliance statement, or full notification to all abutters. Intervenor's Ex. 95 (hearing notice).

Through their corporate shell game and pattern of conduct, Bio Energy's and Regenesys' officials defeated the rights of the public and the DES to complete, truthful applications and information.

V. **DES' Notice of Proposed Permit Revocation and Related Administrative Proceedings**

On or about November 22, 2004, the DES Waste Management Division issued a Notice of Proposed License Action ("NPLA") announcing its intent to revoke the Permit. CFNH, as well as another citizen group (Residents Environmental Action Committee for Health, "REACH") and the Town of Hopkinton, were permitted to intervene in the revocation proceedings. In a written decision dated February 17, 2005, Presiding Officer Walls narrowly defined the scope of the administrative proceedings. In response to that decision and additional information compiled in the course of discovery efforts to date, the DES issued an Amended Notice of Proposed License Action ("ANPLA"). In the ANPLA, the DES asserted a broader set of facts, bringing within its scope some issues that were ruled beyond the scope of the original Notice. Among other things, the ANPLA expanded the scope to include the Respondent's past actions and representations and omissions made in connection with its larger pattern of conduct, particularly as related to the various Permit applications.

The parties engaged in some discovery, which was limited by rulings issued by Presiding Officer Walls. On March 18, 19 and 20, 2005, Presiding Officer Walls conducted an evidentiary hearing related to the ANPLA. On June 23, 2005, Presiding Officer Walls issued the Decision.

STATEMENT AS TO CFNH'S STANDING

CFNH is a non-profit corporation dedicated to protection of the environment of New Hampshire and the public health of New Hampshire citizens. Its corporate address is 580 Brockway Road, Hopkinton, New Hampshire 03229. CFNH has approximately 25 members, including many Hopkinton residents living in close proximity to the Facility – some owning property abutting the Facility or abutting the adjacent properties owned by corporate affiliates of the Facility's owners/operators.

CFNH's members – and, in particular, those that live in close proximity to the Facility – will suffer direct and adverse effects as a result of Presiding Officer Walls' Permit Decision in a way that is more than any impact of the decision on the general public, because

- (1) In the Permit Decision, Presiding Officer Walls properly revoked the Permit on certain grounds, but erroneously failed to revoke on a more serious ground – i.e. Regensis' lack of reliability and integrity. This leaves open the possibility of Regensis officials' reapplying for a solid waste permit and potentially operating Facility.
- (2) If this Facility becomes operational, it would be the largest single emitter of lead into the air in New Hampshire. The Facility operations would involve the transport of thousands of tons of solid waste containing hazardous material into the region and to the Facility. The Facility operations would involve the storage, incineration and generation of thousands of tons of solid waste containing hazardous material – which has been documented to be a threat to public health, the air, land and water. Even if the Facility were operated in full compliance with the law (and even more so if it

were not), CFNH members – due to their proximity to the Facility – would be disproportionately impacted by, among other things, the air pollution, noise and traffic associated with the Facility operations.

- (3) Presiding Officer Walls also erred in concluding that Bio Energy and/or Regenesys provided proper notice to the public pursuant to Env-Wm 303.05(d) in connection with their solid waste permit applications when they sent notices to their corporate affiliates and not to abutters to those affiliates. To the extent this conclusion may have any preclusive effect in the future, it will deprive some CFNH members of a valuable and statutorily mandated mechanism for being informed of licensing-related activities at the Bio Energy Facility.
- (4) CFNH has a lawsuit pending entitled CFNH v. Bio Energy, LLC et al., Merrimack Superior Court No. 04-EO-387 (“CFNH Lawsuit”), which involves significantly overlapping facts and issues as those addressed by the Permit Decision. Accordingly, the Permit Decision and any appeal from that decision may substantially affect CFNH’s claims and interests in the CFNH Lawsuit.
- (5) CFNH was allowed to intervene in the administrative proceedings related to the Permit Decision¹ and actively participated in those proceedings. See New Hampshire Practice, Vol. 4, pp. 132-133, § 6.23 (1997) (“Once a person has been allowed to intervene, as a party, he has all the rights of a party in the case as it then exists and thereafter develops (emphasis added) (citing In re Petition for Admission of Demers, 130 NH 31 (1987) (the Superintendent of the State Hospital petitioned to intervene in an involuntary commitment proceeding after the entry of an order of

¹ See Order on Motions to Intervene (December 22, 2004), attached as Exhibit H hereto.

commitment imposing special conditions on him; the Supreme Court recognized that the Superintendent became a party to the proceeding after being allowed to intervene and was thereby authorized to pursue a direct appeal of the order and of the court's refusal to reconsider it)).

- (6) Regensis previously stipulated to CFNH's standing in this matter.²
- (7) As a person or persons aggrieved, CFNH would have a clear statutory right to appeal any decisions of the Waste Management Council. See RSA c. 21-O:14, III ("Persons aggrieved by the disposition of administrative appeals before any council established by this chapter, ... may appeal such results in accordance with RSA 541."); see also Appeal of the Londonderry Neighborhood Coalition, 145 N.S. 201, 202 (2000) (Nonprofit corporation comprised of local residents that "was granted limited intervenor status by" the Energy Facility Site Evaluation Committee and was allowed to actively participate in the hearings before the Committee had standing to pursue an appeal to the New Hampshire Supreme Court pursuant to RSA 541:3). It would be nonsensical for CFNH to have standing in the administrative proceedings underlying the Permit Decision and also to appeal from a decision by the WMC, but to not have standing to appeal to the WMC or participate in appeals filed by others with the WMC.

If and to the extent necessary, all rights reserved, CFNH has also filed simultaneously herewith a Petition to Intervene, seeking authorization to intervene under RSA 541-A:32, I or II to pursue this appeal and to participate in any appeal(s) initiated by Regensis or any other person relating to the Permit Decision.

² See Hearing Transcript, pp. 198-199 (April 18, 2005), excerpts attached as Exhibit I hereto.

SUMMARY OF ARGUMENT

I. THE EVIDENCE PRESENTED IN THE UNDERLYING ADMINISTRATIVE HEARING DEMONSTRATES THAT REGENESIS' OFFICIALS LACK SUFFICIENT RELIABILITY AND INTEGRITY TO OPERATE A SOLID WASTE FACILITY

Env-Wm 306.04(a) provides as follows (emphasis added):

A permit shall be revoked if the department determines ... that: (1) Good cause as provided in Env-Wm 306.05 exists; and (2) There are no circumstances by which the permittee can correct or eliminate the underlying problem.

Env-Wm 306.05 defines "good cause" to include one, among other things, that "The permittee or the facility meets any other criteria for permit denial as specified in Env-Wm 305" (Env-Wm 306.05(c)), which provides that a permit "shall be denied" if the applicant meets the criteria for denial pursuant to RSA 149-M:9, IX. RSA 149-M:9, IX(a) in turn provides for permit denial (and, therefore, revocation) if

The person fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility.

The facts established through the evidence presented in the revocation proceedings demonstrate that the companies and individuals involved with the Facility – namely Messrs. Dell'Orfano, Smith and DiNapoli – lack the reliability and integrity statutorily required of them to operate a solid waste facility. Indeed, Presiding Officer Walls, through his own findings, made clear that their specific intent was to circumvent or defeat the solid waste regulations. For example, he found:

- "Regenesis concocted an elaborate scheme which was purportedly aimed at removing Mr. DiNapoli from involvement in the operation of the Bio Energy facility." Decision, p. 20, ¶ 136.
- "Rather than seeking DES' approval of the transfer from Bio Energy Corp. to Bio Energy LLC as required, or even discussing the situation with DES,

Dell’Orfano and Smith instead devised a corporate shell game and otherwise elaborate scheme aimed at circumventing the disclosure requirements. Decision, p. 52, ¶ 37.

- “The entire complex corporate and contractual artifice undertaken willfully by Respondent, between June, 2002 and December 2002, and ongoing thereafter, was expressly designed and intended to avoid any disclosure of Anthony DiNapoli’s involvement with multiple entities involved with the Bio Energy Facility and multiple aspects of said Facility...(b) This willful course of action was also expressly designed and intended to avoid filing a compliance statement with NHDES in conjunction with Env-Wm 303.15... (c) This willful course of action violated RSA 149-M and was deceptive and misleading.” Decision, p. 82, ¶ 3.

Presiding Officer Walls also confirmed that, in carrying out this scheme, Regenesys’ officials provided false and misleading information to government officials, concealed or omitted other material information, and otherwise violated the solid waste statutes and rules on numerous occasions in connection with their solid waste permit applications (discussed below).

These findings show that the applicant is unreliable in the most basic sense – DES and the public cannot trust them to provide information or to comply with regulations.³ They also prove the applicants’ intentional evasion of known disclosure requirements – the antithesis of integrity.⁴ Presiding Officer Walls’ conclusion that the evidence did not establish their lack of reliability and integrity cannot be reconciled with these findings or the more detailed findings discussed below and is otherwise arbitrary and capricious and contrary to law.

³ Reliable is defined as “a person or thing with such trustworthy qualities” (THE NEW OXFORD AMERICAN DICTIONARY, (Jewell, E.J. Abate, F. eds., Oxford University Press) (2001)) or “Dependable. To be trusted to do what is expected or has been promised” (ENCARTA WORLD ENGLISH DICTIONARY, (St. Martin’s Press, New York) (1999)).

⁴ Integrity is defined as “the quality of being honest and having strong moral principles; moral uprightness” (THE NEW OXFORD AMERICAN DICTIONARY, (Jewell, E.J. Abate, F. eds., Oxford University Press) (2001) or “steadfast adherence to a strict ethical code” (The American Heritage College Dictionary (3d Ed. 1997)).

The evidence demonstrated, and Presiding Officer Walls found, that after learning of DiNapoli's conviction in June, 2002 and realizing that the Permit transfer application would require disclosure of DiNapoli's conviction (a fact they wanted to keep from DES **and the public**), Regenesi's officials devised a corporate shell game and circumvention scheme that included (1) not filing the Type IV Permit Modification application required in connection with the sale of the Facility to Bio Energy LLC, (2) removing DiNapoli from Bio Energy Corp. (which had already sold all of its assets to Bio Energy LLC and was being dissolved) – without filing a Type IB Permit Modification application required for such changes in a permittee's organizational structure, (3) executing a lease between Bio Energy LLC and yet another company owned by Dell'Orfano, Regenesi Corporation, which purported to provide Regenesi with some limited, future operational control over the Facility, and (4) by then submitting a Type IV Permit Modification application seeking to transfer the Permit from the defunct Bio Energy Corp. to Regenesi and, in that application, mischaracterizing the roles of the various affiliated entities and individuals and otherwise misrepresenting and/or omitting material information to avoid disclosure or scrutiny of DiNapoli's conviction. Decision, pp. 52-53, ¶ 37.

The evidence demonstrated, and Presiding Officer Walls found, that in carrying out this scheme, Regenesi's officials provided materially false, misleading and incomplete information to the DES, the Attorney General's ("AG") office and the public in and in connection with the Transfer Application. For example, in the 2002 Transfer Application, Regenesi's officials

- Falsely certified that none of the applicants' officers, directors or 10% owners had been convicted of a felony. Decision, pp. 68-70.

- Falsely or misleadingly identified “Bio Energy Corporation” as the “Facility name” and “existing permittee,” although the Facility had been transferred to Bio Energy LLC and Bio Energy Corporation had already been dissolved. Decision, p. 30 ¶¶ 6-8; pp. 46-47, ¶¶ 22-24; pp. 52-54, ¶ 37, pp. 70-71, ¶¶ C-D; p. 81 ¶ 1(e).
- Falsely or misleadingly identified Regenesys Corporation as the “proposed new permittee” and “facility operator following transfer of the permit” – although in fact Bio Energy LLC was and continued to be the owner and operator of the Facility for many months after the requested permit transfer modification was issued. Decision, p. 16, ¶ 93; pp. 37-38, ¶ 39; pp. 52-54, ¶ 37; pp. 62-63, ¶¶ 57-58.
- Misleadingly failed to note in Section IV(1) of the Application that Bio Energy LLC already owned the property, instead identifying it as the post-transfer property owner. Decision, pp. 52-54, ¶ 37.
- Created the false impression that Bio Energy Corporation owned and operated the Facility at the time the application was filed, that Regenesys would be the sole operator of the Facility after issuance of the requested Permit Modification, and that Bio Energy LLC was nothing more than the future owner of the underlying property with no current or future role in Facility operations or responsibility for compliance with the Solid Waste Permit (despite the fact that by December, 2002, the Facility had been transferred to Bio Energy LLC, Bio Energy Corp. had dissolved, all other environmental permits had been transferred to Bio Energy LLC, and Bio Energy LLC had represented to numerous governmental officials in different contexts that Bio Energy LLC was the current owner and operator of the Facility).⁵ Decision, p. 30, ¶¶ 6-8; p. 33, ¶¶ 19 & 21; p. 51, ¶ 35; pp. 52-54, ¶ 37; p. 81, ¶ 1(e).

The evidence demonstrated, and Presiding Officer Walls found, that Regenesys’ officials also concealed and/or omitted material information in connection with the Permit and related application proceedings. For example, nowhere on the Transfer Application and at no point during that application process, did Bio Energy or Regenesys inform the DES solid waste program that

- the ownership and operational control of the Facility had already been transferred

⁵ Similarly, the Notice of Filing that was sent to various members of the public in December, 2002 also falsely identified “Bio Energy Corporation” as the “Existing Facility Identification,” as the “Existing Name and Mailing Address of the Applicant, Facility Owner and Facility Operator,” and as the “Existing Name and Mailing Address of Property Owner.” Intervenor’s Ex. 69, at INT0750-753; State Ex. 14. It also falsely stated that “Bio Energy Corporation owns and operates [the Facility],” and omitted any reference at all to Bio Energy LLC. Similarly, the letter utilized to send that Notice to various members of the public was on Bio Energy Corporation letterhead and falsely stated that the Application related to “Bio Energy Corporation’s power generation facility.” Intervenor’s Ex. 68, at INT0716-722.

to Bio Energy LLC – unlawfully, because it was done without having obtained a Type IV Permit Modification as required by Env-Wm 315.02(f) and 315.03 prior to any “change in the: (1) Operational control of a facility; or (2) Ownership of the facility....”. Decision, p. 51, ¶ 35; pp. 52-54, ¶ 37; p. 57, ¶ 45.

- The Permit had already purportedly been transferred to the LLC – unlawfully, for the same reasons. Decision, p. 51, ¶ 35; p. 57, ¶ 47.
- Mr. DiNapoli had resigned from Bio Energy Corp. and Bio Energy Corp. had dissolved in August, 2002 – unlawfully to the extent Bio Energy Corp. still held the Solid Waste Permit (as alleged by Regenesys), because it was done without having obtained a Type IB or Type III Permit Modification as required by Env-Wm 315.02(e)(6), 315.02(c) and 315.03. Decision, p. 57, ¶ 46; p. 89, ¶ 14.
- All other environmental permits associated with the Facility were held by or in the process of being transferred to or obtained in the name of the LLC. Decision, p. 57, ¶ 48.
- Regenesys was not licensed to conduct business in New Hampshire until January 21, 2003. Decision, p. 60, ¶ 54.
- The LLC had operational control over the Facility at the time the Transfer Application was filed and for at least many months beyond that time. Decision, pp. 60-62, ¶ 55.
- Mr. DiNapoli was a member of the LLC, had been convicted of a felony, remained involved in Facility operations (at least through financing), and, under the lease agreement between the LLC and Regenesys and due to his being a 50% member of the LLC, retained significant authority over the operations, including matters of environmental compliance. Decision, p. 58, ¶ 49; pp. 59-62, ¶¶ 53 & 55-56.
- Mr. DiNapoli and Bio Energy LLC stood to reap most of the net profits generated from the Facility operations pursuant to the Lease with Regenesys.⁶ Decision, pp. 59-60, ¶¶ 52-53.

⁶ Similarly, in correspondence to the AG’s office dated December 11, 2002, Mr. Smith made several misleading statements, including but not limited to those in the second to last paragraph stating, in effect, that the only individuals required to submit Personal History Disclosure Forms were Messrs. Dell’Orfano, Smith, O’Neil and Ms. Sheehy because they were the officers and key employees of Regenesys. Intervenor’s Ex. 69; State Ex. 14.

On March 3, 2003, Ms. Nickerson of the AG’s office wrote a letter to Mr. Dell’Orfano seeking clarification of, among other things, the relationship between Xgenesys, Regenesys and Bio Energy LLC (the confusion stemming from inconsistent information provided in the disclosure forms). Intervenor’s Ex. 87. In his response to that request, Mr. Dell’Orfano acknowledged the significant officer/employee overlap between Xgenesys and Regenesys, reiterated falsely or misleadingly that the “key employees that will be involved in the project” would be himself, Smith, Sheehy and O’Neil, and, significantly, did not mention

The evidence demonstrated, and Presiding Officer Walls found, that in addition to violating the Solid Waste Rules by providing false, misleading and materially incomplete information,⁷ Regenesys' officials also violated RSA 149-M and the Solid Waste Rules during the course of their corporate shell game by, among other things,

- Failing to apply for Permit modifications required by Env-Wm 315.02(f) and Env-Wm 315.03(b)(4) before the Bio Energy Corporation transferred ownership and operational control of the Facility to Bio Energy LLC.⁸
- Failing to apply for Permit modifications required by Env-Wm 315.02(e)(6) and 315.02(c) prior to the "change in organizational structure, officers, directors ... or entities holding 10% or more of the permittee's equity or debt" that occurred in August, 2002 when DiNapoli resigned from Bio Energy Corp. and when Bio Energy Corp. dissolved. Decision, p. 57, ¶ 46; p. 89, ¶ 14.⁹

Bio Energy LLC at all – ignoring entirely Ms. Nickerson's request for clarification as to its involvement with the Facility and other Bio Energy entities. Intervenor's Ex. 88.

When DES employee Mr. Dykstra asked Mr. Smith directly about Mr. DiNapoli's involvement with the Facility in connection with the December, 2002 Transfer Application, Mr. Smith stated falsely that Mr. DiNapoli was in the process of divesting himself from the Facility and mentioned nothing about the company's concerns with respect to Mr. DiNapoli. Transcript II, at 207-208. In fact, Mr. DiNapoli was not divesting himself from the Facility. Indeed, he was made a Managing Member of Bio Energy LLC in July, 2003 (retroactively effective to January, 2003) and under the Lease with Regenesys stood to reap profits generated from the Facility operations.

⁷ As noted by Presiding Officer Walls, on the Transfer Application (Decision, p. 71):

Mr. Dell'Orfano signed a statement representing on behalf of Bio Energy Corporation and Regenesys that "the information and material submitted herewith is correct and complete." This statement is not accurate. The unapproved transfer of Bio Energy Corporation's assets and its subsequent dissolution were not disclosed in the application. The transfer application was incomplete and misleading with respect to important and material information – the current corporate existence of the permittee, Bio Energy Corporation and an explanation how its responsibilities under the permit had been extinguished without approval by DES.

⁸ Decision, p. 71 ("It was a violation of the Solid Waste Rules for Bio Energy Corporation to delay seeking DES approval for the dissolution of the corporation and the transfer of the operational control of the facility while it attempted to address the permitting difficulty presented by Mr. DiNapoli's conviction.").

⁹ Env-Wm 315.03(a) provides that "Before making a modification to the design, construction, operation or closure of a facility as permitted by the department, the permittee shall obtain written approval for such modification in accordance with this subpart." (Emphasis added).

- Willfully designing a “complex corporate and contractual artifice undertaken willfully by Respondent .. expressly designed and intended to avoid any disclosure of Anthony DiNapoli’s involvement with multiple entities involved with the Bio Energy Facility and multiple aspect of said Facility,” which “will course of conduct violated RSA 149-M and was deceptive and misleading.” Decision, p. 81-82, ¶ 3.
- Purporting to assign operational control of the Facility from Bio Energy LLC to Regenesys pursuant to a lease without prior approval from the DES. Decision, p. 83, ¶ 5.
- Actively proceeding with Bio Energy LLC’s past and ongoing construction and operation of the Facility without the required solid waste permit, particularly with Mr. DiNapoli’s substantial involvement with Bio Energy LLC as an owner and manager.” Decision, pp. 83-84, ¶ 6.

Yet, despite acknowledging this pattern of conduct, the many false and misleading statements and material omissions, and the numerous violations of the solid waste laws, Presiding Officer Walls concluded in the Decision: “I do not believe, however, that the evidence relating to these failures supports a finding that the current permit holder, Regenesys, lacks the reliability and integrity to operate a solid waste facility.... Good cause does not exist to revoke the permit based on the permittee’s alleged lack of reliability and integrity.” Decision, p. 72 (emphasis added). This conclusion is astounding; it is in direct conflict with the evidence, the plain meaning of the terms “reliability” and “integrity,” and the spirit of New Hampshire’s solid waste laws.

The specific “failures” to which Presiding Officer Walls referred are the failures of Bio Energy’s and Regenesys’ officials to disclose (1) DiNapoli’s felony conviction and (2) the dissolution of Bio Energy Corporation. These “failures” – and the directly related false and misleading representations and omissions concerning the conviction and the corporate status of Bio Energy – alone demonstrate that Regenesys’ officials lack the

requisite reliability and integrity. Even if that were not enough, the larger pattern of conduct established by the evidence and confirmed by Presiding Officer Walls' findings certainly demonstrate this. Presiding Officer Walls erred in not considering the larger pattern of conduct established through the evidence before him – all of which was within the scope of the ANPLA.

The preponderance of the evidence presented in the underlying proceedings establishes that Regensis' officials' lack reliability and integrity and the Permit should be revoked upon this additional ground.

II. ADDITIONAL EVIDENCE THAT WAS IMPROPERLY PRECLUDED IN THE UNDERLYING PROCEEDINGS ESTABLISHES THAT REGENESIS' OFFICIALS LACK SUFFICIENT RELIABILITY AND INTEGRITY TO OPERATE A SOLID WASTE FACILITY

A. Introduction

Presiding Officer Walls' decision on the reliability and integrity issue was also arbitrary and capricious because it failed to consider additional relevant facts that he precluded the discovery and presentation of during the course of the revocation proceedings. These evidentiary rulings stemmed from his too narrow interpretation of the ANPLA and related administrative proceedings.

In a written decision dated February 17, 2005, Presiding Officer Walls narrowly defined the scope of the administrative proceedings based on his interpretation of the initial Notice of Proposed License Action (denying CFNH's motions for a broader scope and to compel production of certain information related to the broader scope). In response to that ruling, the DES issued the ANPLA, expanding the allegations of the original NPLA and more clearly extending to the Respondent's reliability and integrity. Among other things, the ANPLA expanded the scope to include the Respondent's past

actions and its representations and omissions regarding the scope of its operations, particularly as they relate to the permit applications addressed by the ANPLA.

However, despite the issuance of the broader ANPLA, Presiding Officer Walls consistently and erroneously adhered to the more narrow scope that he identified in his February 17, 2005 decision in issuing evidentiary rulings and, ultimately, in rendering his Decision. Indeed, even in the final Decision, he defined the issues presented as those set forth in his February 17 decision – as if the ANPLA was never issued. See Decision at pp. 2-3.

B. The ANPLA Broadened the Inquiry Into the Respondent's Reliability and Integrity.

Under the relevant statutory provisions, a solid waste permit application will be denied if the applicant “fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility.” RSA 149-M:9. The rules for license revocation incorporate this criterion through Env-Wm 305.03(b)(1). The ANPLA specifically invoked this broader “reliability and integrity” test. Presiding Officer Walls erred in adopting Bio Energy’s narrow interpretation of the ANPLA as referring only to the failure to disclose DiNapoli’s conviction or Bio Energy Corp.’s dissolution and erred in rendering evidentiary rulings based on that interpretation.

For example, at ¶¶ 10-19, the ANPLA begins with a discussion of the Respondent’s conduct in applying for the Solid Waste Permit ultimately issued on May 28, 2002 – going beyond merely the Type IV modification requested on December 2, 2002 (¶ 29), which the Respondent claimed was the focus of the original notice. The ANPLA alleges (¶¶ 11- 36, 41-47) a pattern of misrepresentations, omissions and misleading statements in the course of applying for both the Solid Waste Permit and Type

IV Modification. The following provisions of the ANPLA are particularly relevant to the reliability and integrity issues:

- III.39. Criteria for permit denial include the applicant's failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility, per RSA 149-M:9, IX(a).
- III.47 The fact that Regenesis officials supplied DES with false or misleading information, as alleged more specifically in paragraphs 1-46 above, calls into question whether the company has sufficient reliability and integrity to operate a solid waste facility.
- IV.2 Regenesis officials' false or misleading statements to DES in the course of the permit proceedings call into question whether Regenesis has the reliability and integrity to operate a solid waste facility.
- V.1 Under the circumstances, the permittee cannot correct the underlying problem. Therefore, DES proposes to revoke the Permit.

C. Materials Produced in the Underlying Proceeding on File with DES Show Bio Energy's Pattern of Lack of Integrity and Reliability

Documents produced in the underlying proceedings show that the misrepresentations alleged in the ANPLA are part of a larger context in which Bio Energy and its principals (also principals in Regenesis) have misrepresented or omitted material information in requesting the Solid Waste Permit and the Type IV Modification.

For instance, the Presiding Officer specifically ordered Regenesis to produce, over its objection, documents consisting of a cover letter dated May 27, 1987 from Napoli Wrecking Company, Inc. ("Napoli") and an agreement between Napoli Wrecking Company, Inc. and Bio-Energy Corp. dated December, 1986. (Intervenor Ex. 147 in underlying proceedings). The Agreement called for the purchase and sale of woodchips. Those woodchips came from construction and demolition materials originating in Massachusetts, as evidenced by the provision excusing seller (Napoli Wrecking) from meeting the specified contract amount in the event of:

A material slowdown of, cessation of or a moratorium upon the interior and/or exterior demolition of structures within Eastern Massachusetts such that Seller is reasonably unable to procure, through tipping fees paid by the possessor of the wood, sufficient waste, used wood to satisfy its obligations to sell under this Agreement.

(Intervenor Ex. 147, at INT1767, 1 2(j)(ii)). The “specifications of the Woodchips” in paragraph 2(h) stated that the seller shall not deliver “any load of woodchips knowing” that the woodchips, when burned would give off any hazardous particulate or illegal substance, but “without limitation, this subparagraph (ii) expressly shall not require Seller, nor impose any responsibility upon it, to inspect, examine or test any wood or woodchips to determine if they contain any such substance.” (Intervenor Ex. 147, at INT1766). Bio Energy itself has represented to the Merrimack County Superior Court that “[t]hroughout the course of its operations, spanning nearly two decades, Bio Energy has utilized a fuel mix of woodchips from a wide range of waste wood sources ... [including] ... woodchips from C & D wood” (See Intervenor Ex. 132 at INT1477-78 - Verified Petition, Bio Energy, LLC v. Selectmen of the Town of Hopkinton, Merrimack Superior Court No. 03-E-0446).

Bio Energy apparently had a similar agreement with Star Recycling of New York, although it did not produce a copy as part of its responses to information requests. A letter from Harry Smith to DES, dated November 30, 1995, refers to Bio Energy’s receipt and processing of construction and demolition wood, including materials containing lead, from Star Recycling, followed by the apparent canceling of the contract when DES found out about the unlawful levels of metals in that wood. (See Intervenor Ex. 154).

There was no ambiguity about what Bio Energy was allowed to store and burn. DES told Bio Energy in November 1995 that it “is not a permitted solid waste facility,

therefore, should not be utilizing refuse-derived fuel.” Intervenor Ex. 153 (Summary of meeting between DES and Bio Energy’s agent).¹⁰ The hazardous waste rule waiver granted on September 3, 1997 did not change this rule; on the contrary, it was granted “subject to the wood ash being exclusively generated from the burning of virgin or clean wood” Intervenor Ex. 162 (INT1829 INT1830). Bio Energy’s permit prior to May, 2002 specifically did not allow it to burn construction and demolition debris. (See Exhibit E to Intervenor Exhibit 132, INT1503 – “prior to May 28, 2002, BioEnergy was operating as a biomass facility” and had only permission to store and burn “clean untreated wood”).

Yet, Bio Energy’s practices led, in at least a period in 1995, to “high total lead concentrations in ash due to burning fuel containing painted demolition debris.” (See Intervenor Ex. 154 - Summary of meeting between DES and Bio Energy’s agent). Nothing produced in discovery suggests that Bio Energy terminated its contract with Napoli Construction to provide just such demolition wood. On the contrary, Bio Energy has represented in Court that, since the 1980s “Bio Energy was burning woodchips derived from a range of fuel sources, including woodchips derived from C & D wood.” (See Intervenor Ex. 132 at INT1485, ¶ 28-29 -Verified Petition, Bio Energy LLC v. Selectmen of the Town of Hopkinton, Merrimack Superior Court No. 03-E-0446). The same document reports that Bio Energy’s ash contained lead from “demolition woodwaste” as of October, 1989. *Id.*, ¶ 29). Given the receipt of construction and

¹⁰ Likewise, Bio Energy’s wood-chip supplier, PetroFiber Corporation (same owners as Bio Energy), received a “permit-by-rule” on June 30, 1993 (DES 2422-2423) based upon Harry Smith’s representations that Petrofiber chipped “only clean, untreated wood, mostly in the form of pallets . . . for subsequent use as fuel at Bio Energy Corporation in West Hopkinton, NH.”

demolition debris, it is little surprise, then, that unlawful metals and other substances turned up in Bio Energy's ash residue. (See Intervenor Exs. 154 and 155).

Despite the evidence of burning demolition wood without a solid waste permit, and of being party to contracts for delivery of construction and demolition wood from Massachusetts and elsewhere, Bio Energy's representations in the recent permit proceedings indicated that it had done nothing wrong. Despite years of burning construction and demolition wood, the Notice of Filing circulated by Harry Smith on Bio Energy Corporation stationery, dated September 28, 2001, disclosed no prior violations of the limitations upon its operations as a biomass facility. The Notice specifically stated that "Bio Energy is requesting NHDES approval to expand its wood fuel mixture to include waste wood material from construction demolition sites that has been separated from other demolition debris." (Intervenor Ex.7 at INT0064). It also represented that its application, if approved, would allow Bio Energy to accept material from outside of New Hampshire. (Id.) Indeed, it also requested a "Waiver Approval," issued on February 15, 2002, just to "conduct a 48-hour test burn of wood chips processed from source-separated wood material (i.e., waste wood material from construction and demolition sites that has been separated from other construction and demolition debris) without a solid waste standard permit." (Intervenor Ex. 28).

In other words, **Bio Energy made false and misleading representations to the DES as though it had not received construction and demolition debris from eastern Massachusetts through Napoli Wrecking, Inc. and Star for several years already.** These representations by Harry Smith (still involved with Bio Energy LLC, Regensis

and affiliated entities) affected the very same Permit was the subject of the revocation proceedings.

Yet, despite the highly relevant nature of these materials to the reliability and integrity of the company's officials and their continued pattern of conduct as alleged in the ANPLA, Presiding Officer Walls prevented the parties from conducting meaningful discovery of such information and also precluded the historical documents from being admitted into the record as evidence. See Hearing Transcript, April 19 (Ex. J hereto), at pp. II-17 to II-20 ("So I'm not going to allow any general inquiry into the reliability and integrity of the company with respect to prior environmental violations or prior misrepresentations unrelated to the felony conviction, and also related to the different corporations and companies that are apparently related to this site... So I will sustain any further objections to broad inquiries into integrity and reliability of the company relating to prior misstatements, other than those specified.")

Presiding Officer Walls' refusal to allow discovery and presentation of such evidence – highly relevant to the reliability and integrity of Regenesys' officials – and his subsequent conclusion that the evidence did not demonstrate their lack of reliability and integrity, were arbitrary and capricious and contrary to law.

D. The Presiding Officer Erred in Refusing Discovery into Attorney/Client Matters and then Relying Upon Purported Advice of Counsel As Alleged Mitigation For the Applicants' Violations.

In declining to find that Regenesys lacks the reliability and integrity to operate a solid waste facility, Presiding Officer Walls cited a company "strategy" that "was based, at least in part, on advice from competent and ethical legal counsel." Decision, p. 72.¹¹

¹¹ These findings are directly contrary to the preponderance of evidence and the Presiding Officer's own findings establishing that the companies' actions were aimed at avoiding disclosure of DiNapoli's

This squarely placed in issue the advice that Regenesis and its affiliates received from its attorneys. At the same time, the Presiding Officer sustained Regenesis' objections during the hearing (See Hearing Transcript, April 20 (Ex. J hereto), at pp. III-70 to III-71) to inquiries regarding the content of attorney-client communications. Regenesis itself asserted the attorney-client privilege for all communications between it, its affiliates and its attorneys at the hearing and in discovery. Id.; Regenesis' Response to REACH's Document Production Demand (January, 5, 2005). The Presiding Officer cannot have it both ways. Either:

- (1) Regenesis cannot assert any alleged reliance upon advice of counsel as a factor in the analysis of reliability and integrity; or
- (2) Full discovery and questioning into the substance of any attorney-client advice regarding this matter must be allowed.

See generally Aranson v. Schroeder, 140 N.H. 359, 370 (1995), quoting Remington Arms Co. v. Liberty Mutual Ins. Co., 142 F.R.D. 408, 415 (D.Del. 1992) ("When the party asserting the privilege has injected privileged material into the case, such that the information is actually required for resolution of the issue, the privilege-holder 'must either waive the attorney-client privilege as to that information or . . . be prevented from using the privileged information to establish the elements of the case'").

The record and the conduct of the proceedings favors alternative (1). Regenesis consistently claimed the attorney-client privilege and therefore is "prevented from using the privileged information" to establish an advice of counsel defense. Id. At the hearing,

conviction and that Mr. DiNapoli's involvement in Bio Energy LLC and the Facility has continued and even intensified. For example, he found that the scheme "was expressly designed and intended to avoid any disclosure of Anthony DiNapoli's ... to avoid filing a compliance statement with NHDES ... [and] was deceptive and misleading." Decision, p. 82, ¶3(a)-(f).

Regenesis permitted testimony that its witnesses had consulted counsel, but did not elicit or allow testimony regarding the substance of counsel's advice. See, Hearing Transcript, April 19-20 (Ex. J hereto), at pp. II-229 to II-230, III-13 to III-17. Cross-examination into the substance of the advice was blocked upon Regenesis' successful evidentiary objections. Hearing Transcript, April 20 at pp. III-71 to III-72. As a result, there was no evidence regarding the content of any advice that counsel may have given. For all the record shows, counsel may well have warned their clients correctly that the applicants' proposed actions were actually or potentially risky, questionable, or illegal. The Presiding Officer had nothing but speculation to back his contrary assumption that Regenesis' counsel unqualifiedly blessed Regenesis' "strategy." Worse, his speculation requires the unseemly assumption that "competent and ethical counsel" endorsed a course of conduct that the Presiding Officer himself found to be false and misleading. In fact, there is simply no evidence to support any finding that Regenesis' strategy reflected counsel's advice or that the unknown input of counsel had any mitigating effect upon Regenesis' lack of reliability and integrity. It follows that neither the Presiding Officer nor Regenesis could rely upon the advice of counsel defense.

Regenesis cannot now claim otherwise without itself putting in issue the advice it obtained from counsel. If, as the Presiding Officer inferred, Regenesis' witnesses intended their testimony to support an inference that Regenesis followed advice of counsel, then Regenesis has already placed that advice and communications at issue. Likewise, if, on appeal, Regenesis relies upon advice of counsel (or the Presiding Officer's assumptions regarding same), it has placed those discussions at issue. In such circumstances, "[i]mplied waiver [of the attorney client privilege] occurs when the

asserting party has put the otherwise privileged communications 'at issue' in the present dispute." Petition of Dean, 142 N.H. 889, 890 (1998)(assertion of ineffective assistance of counsel automatically waives the attorney-client privilege to the extent relevant to the ineffectiveness claim), citing cases, including Aranson, supra. Such waiver allows inquiry at trial and in discovery into the substance of the attorney-client communications relating to Regensis' "strategy" and conduct of the licensing proceedings, sufficient for resolution of the claim of reliance upon advice of counsel. See generally Id., Aranson, 140 N.H. at 370. It was therefore error to prohibit such discovery and questioning if Regensis was really putting in issue the advice it received from counsel.

As it stands now, however, the Presiding Officer has relied upon supposed advice of counsel, while prohibiting inquiry into what that advice may have been. That is the one approach that the case law plainly prohibits.

III. BIO ENERGY/REGENESIS DID NOT PROVIDE PROPER PUBLIC NOTICE PURSUANT TO ENV-WM 303.05(D) IN CONNECTION WITH THEIR SOLID WASTE PERMIT APPLICATIONS

The Solid Waste Rules require that notice of filing of a solid waste permit or modification application be provided to owners of property abutting the facility site.

Decision, p. 72, ¶ G; pp. 89-90, ¶ 17. DES's regulations at Env-Wm 303.05(d) provide:

If the applicant or owner of the facility site owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant or facility site owner.

Presiding Officer Walls, in the Decision, ruled that these provisions “do not require that notices be provided to additional unrelated abutting property owners if parcels adjacent to a facility site are owned by persons or entities who are legally distinct from the applicant or permittee but share a commonality of ownership control.” This conclusion was arbitrary and capricious and contrary to law. To the extent this conclusion may have any preclusive effect in the future, it will deprive the public (including CFNH members) of a valuable and statutorily mandated mechanism for being informed of licensing-related activities at the Bio Energy Facility.

Under Env-Wm 303.05(d), abutters entitled to notice include landowners beyond any adjoining properties held in common ownership with the facility site. In this case, Regenesys claims that it satisfied the notification requirements by notifying its own commonly owned affiliates, PetroFiber and Bedford Corporation, as detailed below. CFNH strongly disagrees. The crux of this dispute is over the definition of the verb “owns”, which neither the statute nor regulation define.¹²

“Ownership” is a flexible term that addresses substantive realities rather than fine legal distinctions based upon who holds technical title; it easily encompasses situations involving common control of property through common corporate ownership of adjoining parcels. See generally Hope v. Cavallo, 316 A.2d 407, 409-410, 163 Conn. 576, 581-2 (1972); Animal Rescue League of Boston v. Assessors of Bourne, 310 Mass. 330, 332-3, 37 N.E.2d 1019, 1021 (1941).

The term “owner” is one of general application and includes one having an interest other than the full legal and beneficial title [citation omitted]. The word owner is one of flexible meaning, and it varies from an absolute proprietary

¹² The regulations define “owner” as “a person who owns a facility or part of a facility” (Env-Wm 102-116), but that somewhat circular definition does not further define the word “owns” and cannot sensibly apply to the question of whether that entity owns abutting parcels.

interest to a mere possessory right. [citation omitted]. It is not a technical term and, thus, is not confined to a person who has the absolute right in a chattel, but also applies to a person who has possession and control thereof.

Hope, 163 Conn. at 580-581, 316 A.2d at 409. In this case, properties abutting the Facility are held in common ownership by closely affiliated corporations and, therefore, notice should have been sent to landowners beyond those properties, but was not.

Once the regulation is interpreted correctly, the duty to notify non-affiliated abutters is clear on the facts.

Notices of the applications for the December, 2002 Type IV Modification and the subsequent Type IA Modification to the Permit went to the following as abutters: The Bedford Corporation (“Bedford”) (owner of Lots 18.01, 19, 19.01, and 25.2), PetroFiber Corporation (“Petrofiber”) (owner of lot 25.1), Papertech Corp. (owner of Lots 18, and 26), CHI Energy, Inc. (owner of Lot 24), and the United States of America-Hopkinton Everett Reservoir (owner of lots 22 and 23). Decision, p. 65, ¶¶ 65-66; Stipulated Facts as to Abutter Notification Issues dated April 20, 2005 (“Stip. Facts Abutter Issue,” Exhibit I hereto), at ¶¶ B.2 & C.2.

PetroFiber is a Delaware Corporation with William Dell’Orfano and Anthony DiNapoli as owners, officers and directors, located at 749 East Industrial Drive, Manchester, NH 03109. Decision, p. 66, ¶ 67; Stip. Facts Abutter Issue, at ¶¶ B.3 & C.3. Similarly, Bedford is a Nevada Corporation with William Dell’Orfano and Anthony DiNapoli as owners, officers and directors, also located at 749 East Industrial Drive, Manchester, NH 03109. Decision, p. 66, ¶ 68; Stip. Facts Abutter Issue, at ¶¶ B.3 & C.3.

Notices of the Transfer Application to both PetroFiber and Bedford were sent on December 2, 2002 to the same address; which was also an address of Bio Energy Corp.,

Bio Energy LLC and Regenesys Corp. - namely "c/o Bio Development, 749 East Industrial Park Drive, Manchester, NH 03109." Decision, p. 66, ¶ 69; Stip. Facts. Abutter Issue, at ¶ B.2. These notices were received by the same person. Decision, p. 66, ¶ 70.

Later, with respect to the Type IA Modification application, notices to both Petrofiber and Bedford were sent on January 16, 2003 to "c/o Xgenesys Development, 749 East Industrial Park Drive, Manchester, NH" - the same address listed for the applicant, Regenesys itself and the owner, Bio Energy, LLC. Decision, p. 66, ¶ 71. Once again, the same person – this time Janice J. Dell'Orfano – received the notice for both PetroFiber and Bedford. Decision, p. 67, ¶ 72.

In short, PetroFiber and Bedford are subsidiaries and/or close affiliates of Bio Energy LLC, Bio Energy Corp., Regenesys, controlled by the same owners and management as the applicant and site owner. In essence, therefore, the applicant notified itself of the applications to modify the permit, by sending notice to purported abutter corporations "c/o Bio Development (or XGenesys), 749 East Industrial Park Drive, Manchester, NH 03109." Affording notice to those entities served no purpose of Env-Wm 303.05 and violated that rule.

Applying Env-Wm 303.05(d) correctly, to require notice to the next parcel not "owned" by the applicant or facility site owner, the applicants were required to notify all abutters to the parcels listed as owned by Bedford or PetroFiber. They should have notified Martin and Donna Grady, III (Map 218, Lots 2, 3 and 60), Stonynook Farm, Inc. (Map 210, Lot 15) and Roger and Norma Andrus (Map 210, Lot 16), who abut the properties owned by the applicant's commonly-owned affiliates. It follows that the

applicant and landowner failed to notify all abutters in connection with the 2002 Type IV Transfer Application or the 2003 Type IA Modification Application.

The importance of public notice cannot be denied. Pursuant to Env-Wm 304.07(b)(2), (3) and (4), the DES must consider all information received from abutters "and other affected entities" as well as "persons participating in a public hearing. . ." and the New Hampshire department of justice. The important purpose of the notice provisions will not be served if a company can satisfy the notice requirements by sending notice to its corporate affiliates and not to the members of the public who abut those affiliated properties.

CONCLUSION

For the foregoing reasons, CFNH respectfully requests that the Waste Management Council issue an Order:

1. Declaring that Regensis' officials lack sufficient reliability and integrity to operate a solid waste facility, pursuant to RSA 149-M:9, IX(a) – constituting an additional, independent ground for revocation of the Permit pursuant to Env-Wm 306.05(c) with preclusive effect upon future applications, based on the evidence presented in the underlying proceedings or, if more is needed, on additional relevant evidence that Presiding Officer Walls erroneously precluded the discovery or presentation of through various erroneous evidentiary rulings;
2. Declaring that Bio Energy and/or Regensis did not provide proper public notice pursuant to Env-Wm 303.05(d) in connection with their solid waste

permit applications when they sent notices to corporate affiliates and not to abutters to such corporate affiliates;

3. Amending the Decision in accordance with the above-referenced declarations and revoking the Permit upon the additional ground that Regensis' officials lacks sufficient reliability and integrity to operate a solid waste facility; and
4. Providing such other relief as is just and proper.

Respectfully submitted,

Citizens for a Future New Hampshire,
By its attorneys

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Date: July 25, 2005

CERTIFICATION

I hereby certify that a copy of the foregoing Notice of Appeal with Exhibits has on this 25th day of July, 2005 been forwarded, via first class mail, postage prepaid, to:

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Jennifer L. Rockers

THE STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

REGENESIS CORPORATION
1994 Maple Street
West Hopkinton, NH 03229

Re: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

WMC NO. _____

APPEAL OF LICENSE
REVOCATION

DES DOCKET NO. 04-010

EXHIBITS

TO

NOTICE OF APPEAL BY
CITIZENS FOR A FUTURE NEW HAMPSHIRE

Respectfully submitted,

Citizens for a Future New Hampshire,
By its attorneys

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Dated: July 25, 2005

EXHIBIT LIST

CFNH NOTICE OF APPEAL WASTE MANAGEMENT COUNCIL

- | | |
|------------------|---|
| EXHIBIT A | Decision on Proposed Revocation of Solid Waste Permit,
NPLA No. 04-010 (June 23, 2005). |
| EXHIBIT B | Decision on CFNH's Motion to Reopen Evidentiary Hearing
(May 9, 2005). |
| EXHIBIT C | Decision on Town of Hopkinton's Motion to Compel
Respondent to Provide Information and Documents in
Response to Town's Information Request (April 26, 2005). |
| EXHIBIT D | Decision on CFNH's Motion to Compel Respondent to Provide
Further Responses to Information Requests (April 14, 2005). |
| EXHIBIT E | Decision on Pending Motions (February 17, 2005). |
| EXHIBIT F | Amended Notice of Proposed License Action, No. 04-010
(March 4, 2005). |
| EXHIBIT G | Notice of Proposed License Action, No. 04-010
(November 22, 2004). |
| EXHIBIT H | Order on Motions to Intervene (December 22, 2004). |
| EXHIBIT I | Stipulated Facts as to Abutter Notification Issues
(April 20, 2005). |
| EXHIBIT J | Excerpts from Hearing Transcript (April 19-20, 2005). |

A

Regenesis Corporation
1994 Maple Street
West Hopkinton, NH 03229

RE: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

NOTICE OF PROPOSED LICENSE ACTION
NO. 04-010

JUNE 23, 2005

DECISION ON PROPOSED REVOCATION OF SOLID WASTE PERMIT

I. Introduction

On or about November 22, 2004, the Department of Environmental Services ("DES") Waste Management Division issued a Notice of Proposed License Action ("NPLA") announcing its intent to revoke Solid Waste Permit No. DES-SW-SP-002 (the "Permit"). An Amended Notice of Proposed License Action ("ANPLA") was filed on March 4, 2005. The Permit is currently held by Regenesis Corporation ("Regenesis"), a successor-in-interest to the original permittee, Bio Energy Corporation. The permit was issued under the provisions of RSA ch. 149-M and NH CODE ADMIN. RULES Env-Wm100-300 and 2100 (the "Solid Waste Rules"). It authorizes the storage and use of wood fuel derived from construction and demolition debris (a solid waste) at an electric generating facility (the Facility) in Hopkinton, New Hampshire.

State solid waste laws and rules restrict the granting of a permit to a business entity if any of its officers, directors, partners, key employees or principal equity holders have been convicted of a felony within 5 years of the application date. DES is also authorized to deny or revoke a permit if an applicant or permittee fails to demonstrate sufficient "reliability, expertise, integrity, and competence to operate a solid waste facility."

The ANPLA alleged that William Dell'Orfano, a principal of both Bio Energy Corporation and Regenesis, made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy Corporation's officers or directors had been convicted of a felony in the 5 years prior to the application to transfer the Permit to Regenesis. Another corporate owner of Bio Energy Corporation, Anthony DiNapoli, had been convicted of a felony on March 25, 2002. The ANPLA asserted that Mr. Dell'Orfano's allegedly false or misleading certification, and other false or misleading statements and omissions made to DES during the course of the permit proceedings, demonstrated that Regenesis does not have sufficient reliability and integrity to operate a solid waste facility. The ANPLA contended that these deficiencies could not be corrected and proposed that the Permit be revoked. If the permit was not revoked, the ANPLA alternatively sought that Regenesis show cause why the 2003 permit modification proceeding should not be re-opened to address alleged inadequacies in the notices provided to abutting property owners.

Regenesis objected to the proposed permit revocation and denied that it had wrongfully withheld information about the conviction or that it had in any way violated or failed to comply with the solid waste statutes and rules. In particular, Regenesis asserted that Mr. Dell'Orfano's certification that no corporate principals had been convicted of a felony was true because Mr. DiNapoli sold his interest in Bio Energy Corporation before the December 2002 transfer application that contained the certification.

In addition to DES and Regenesis, the Town of Hopkinton and two citizens' groups, Residents Environmental Action Committee for Health ("REACH") and Citizens for a Future New Hampshire ("CFNH"), participated as intervenors in this matter. The intervenors sought a broad inquiry into the conduct of Bio Energy Corporation, Bio Energy LLC and Regenesis with respect to the Facility. In a Decision on Pending Motions dated February 17, 2005, the scope of this proceeding was limited to matters "relevant and material to the facts summarized in Section III of the NPLA [later to become the ANPLA], and to the violations and proposed actions described in Sections IV and V." The issues to be addressed in this decision were described as follows:

1. Whether William Dell'Orfano made a false or misleading statement when he certified in December of 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for a permit transfer.
2. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the failure to disclose a felony conviction of a corporate principal.
3. Whether Mr. Dell'Orfano provided misleading or incomplete information to DES by failing to disclose that Bio Energy Corporation had been dissolved in the 2002 transfer application.
4. Whether good cause exists as provided in Env-Wm 306.05, to revoke the permit based on the failure to disclose the dissolution of Bio Energy Corporation.
5. Whether the alleged failures to disclose the felony conviction or the dissolution of Regenesis (a mistake-actually, Bio Energy) Corporation demonstrate that Regenesis Corporation lacks the reliability and integrity to operate a solid waste facility.
6. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the permittee's lack of reliability and integrity.
7. Whether the required notices to abutters in the 2002 transfer proceeding and the 2003 permit modification proceeding complied with Env-Wm 303.05 (d), and, if not, whether either of these prior proceedings should be reopened.

An adjudicative hearing was conducted on April 18-20, 2005. The parties and intervenors submitted post-hearing memoranda, and proposed findings of fact and conclusions of law.

Based upon the following findings of fact, analysis, and conclusions of law, there is good cause to revoke the permit.

II. Findings of Fact

The witness testimony and documentary exhibits received at the hearing support affirmative findings of the following facts (those not found to be true or accurate are marked "DENIED"):

A. DES REQUESTS (Numbered as in requesting document)

Amended Notice of Proposed License Action-March 4, 2005

10. On October 9, 2001, Bio Energy Corporation ("Bio Energy") submitted an application for a solid waste facility permit for a facility located at 2003 Maple Street in West Hopkinton, N.H. ("Bio Energy Facility").

11. On October 16, 2001, Anthony DiNapoli, also known as Antonio DiNapoli, submitted a Personal History Disclosure Form to the AGO in connection with Bio Energy Corporation's application.

12. Mr. DiNapoli's responses on the form included a sworn statement that he had no criminal convictions (motor vehicle offenses excepted).

13. On October 18, 2001, Mr. DiNapoli was indicted in Hillsborough County Superior Court for witness tampering, a felony.

14. On November 5, 2001, the AGO performed a criminal record check on Mr. DiNapoli. The search revealed nothing inconsistent with Mr. DiNapoli's response on the form. There was no indication of the recently filed charges.

15. On January 28, 2002, while the solid waste facility application was pending, the Directors of Bio Energy unanimously approved a plan of liquidation for the company, which stated an effective dissolution date of August 31, 2002.

16. In response to an inquiry from the AGO in early March of 2002, prompted by a March 7, 2002 newspaper article indicating that the Bio Energy facility was closing, Bio Energy confirmed that the article was accurate but stated that the company wished to go forward with the solid waste permit application process and intended eventually to transfer the solid waste permit to another company.

17. On March 20, 2002, the AGO conveyed the results of its Bio Energy background investigation to DES.
18. On March 25, 2002, Mr. DiNapoli was convicted in Hillsborough County Superior Court of witness tampering, a felony. The conviction was affirmed by the New Hampshire Supreme Court in *State v. DiNapoli* 149 N.H. 514 (2003).
19. On May 28, 2002, DES issued Solid Waste Permit No. DES-SW-SP-002 ("the Permit") to Bio Energy, without knowledge of Mr. DiNapoli's felony conviction.
20. On June 12, 2002, Bio Energy executed a Purchase and Sale Agreement conveying the Bio Energy Facility, including the buildings, the underlying property, most of the facility's equipment and machinery, and "to the extent transferable, all permits, licenses, authorizations and approvals issued or granted to Seller by any governmental agency. . ." to a new entity, Bio Energy, LLC. The Permit was specifically listed as one of the transferred assets. The agreement was executed on behalf of both buyer and seller by William Dell'Orfano. Mr. Dell'Orfano was listed as President of Bio Energy Corporation, and Manager of Bio Energy, LLC.
21. In mid-June of 2002 both Mr. Dell'Orfano and Bio Energy/Regenesis official Harry Smith urged Mr. DiNapoli to resign from Bio Energy Corporation due to concerns about how the felony conviction might impact the company's solid waste facility Permit.
22. Mr. DiNapoli did not resign from Bio Energy, LLC. From at least August 30, 2002 to the present, Mr. DiNapoli has been a member and a creditor of Bio Energy, LLC. From July 29, 2003 to the present, Mr. DiNapoli has also been a managing member of Bio Energy, LLC.
23. On or about July 1, 2002, Bio Energy submitted a request to the Air Resources Division ("ARD") of DES to transfer the Title V air permit from Bio Energy Corporation to Bio Energy, LLC. Under the applicable administrative rules, a change in ownership for purposes of a Title V permit is considered an Administrative Permit Amendment, and does not require a background investigation.
24. On August 30, 2002, Bio Energy Corporation filed Articles of Dissolution with the New Hampshire Secretary of State.
25. During the fall of 2002, Bio Energy asked DES to transfer its Hazardous Waste Identification Number, its registration for four aboveground storage tanks, and its certification of waste-derived product from Bio Energy Corporation to Bio Energy, LLC. None of the programs notified of the change required a background investigation in conjunction with a change of ownership. In correspondence associated with the name change, Bio Energy indicated that "September 1, 2002 all of the assets owned by Bio Energy Corporation were transferred to Bio Energy LLC." However, Bio Energy did not apply to the DES solid waste program for permission to transfer the solid waste Permit to Bio Energy, LLC.

26. Bio Energy had originally applied for a solid waste permit in 2001 because it proposed to burn waste wood material classified as solid waste, which made the operation an incineration facility under the solid waste rules. The company did not propose to process wood material into wood fuel chips at the Bio Energy facility, and no permit was issued for that activity.

27. According to the facility's Title V air permit issued by the ARD, the "significant activities" at the facility consist of operation of a wood-fired boiler and circulation water cooling tower.

28. As a practical matter, the activity allowed under the solid waste permit was the same as the activity allowed under the air permit: burning fuel generated from waste wood material to create electricity.

29. On December 2, 2002, Bio Energy Corporation, Bio Energy, LLC and Regenesi Corporation filed with DES an application to transfer the Permit to Regenesi ("the Transfer Application"). All three corporations gave the same mailing address of 1994 Maple Street, West Hopkinton, NH 03229, and the check that accompanied the application was from a Bio Energy, LLC account. Corporate officials represented to DES and the AGO that the four individuals who would be required to complete Personal History Disclosure Forms had already completed the forms in connection with the Bio Energy background investigation. With the exception of Mr. DiNapoli, the officers and directors of Regenesi Corporation were the same as the officers and directors of Bio Energy.

30. On the Transfer Application, William Dell'Orfano signed, on behalf of both the existing permittee and the proposed permittee, the certification required under Env-Wm 303.14. Specifically, this included a certification that none of Bio Energy's officers or directors had been convicted of a felony during the five years before the date of the application. None of the statements on either certification were circled as untrue, and no Compliance Reports or explanations were attached.

31. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy inform the DES solid waste program that the company had been dissolved.

32. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesi inform the DES solid waste program of the purported transfer of the Permit to Bio Energy, LLC.

33. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesi inform the DES solid waste program that other environmental permits associated with the facility were held not by Regenesi but by Bio Energy, LLC.

34. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesi inform the DES solid waste program that Mr. DiNapoli had been convicted of a felony, that he had resigned from any company, or that there were any concerns about his continued involvement with the facility.

35. During the Transfer Application process, Regenesi corporate officials led the DES solid waste program to believe that Mr. DiNapoli was in the process of divesting himself from involvement with the Bio Energy facility. They did not inform the program when Mr. DiNapoli later became a managing member of Bio Energy, LLC.

36. On the Transfer Application, Mr. Dell'Orfano signed the following statement on behalf of both the existing permittee (Bio Energy Corporation) and the proposed new permittee (Regenesi): "To the best of my knowledge and belief, the information and material submitted herewith is correct and complete. I understand that any approval granted by DES based on false and/or incomplete information shall be subject to revocation or suspension, and that administrative, civil or criminal penalties may also apply."

41. Because Mr. DiNapoli was an officer or director of Bio Energy when he was convicted of felony witness tampering on March 25, 2002, Mr. Dell'Orfano made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer.

42. In an effort to avoid disclosure of Mr. DiNapoli's felony conviction, Bio Energy/Regenesi officials applied to transfer the Permit to an entity with which Mr. DiNapoli was not involved, did not inform the agency that Mr. DiNapoli had resigned or that they had concerns about his fitness to participate in management of the company, and misled DES staff about Mr. DiNapoli's ongoing involvement with the facility. These representations and omissions were false or misleading.

43. Even if Regenesi can show that Mr. DiNapoli resigned from Bio Energy Corporation prior to Mr. Dell'Orfano's certification, it was misleading for the company not to disclose the conviction in connection with the Transfer Application. Mr. DiNapoli continued to be involved with the facility through Bio Energy, LLC, to a degree that would have necessitated disclosure had the Permit been transferred to that entity. As a practical matter, a person could not be involved in the "facility" for purposes of the air permit without also being involved in the "facility" for purposes of the solid waste permit.

44. Further, it was misleading for Regenesi not to inform DES that the company holding the Permit had been dissolved three months prior to the application, that the Permit had purportedly been conveyed without DES approval to Bio Energy LLC in June of 2002, and that other environmental permits for operation of the same facility as the solid waste Permit were held by a different entity.

45. The solid waste rules and transfer application form provide an avenue for disclosing information such as environmental violations and criminal convictions, through submission of a Compliance Report. It was reasonable for the DES solid waste program to expect that an applicant with concerns about disqualifying information would bring it to the agency's attention through such a report, as requested on the form.

46. In making its decision to transfer the Permit, the DES solid waste program reasonably relied upon the false or misleading information supplied by Regensis officials. Because of this reliance, the DES solid waste program did not ask the AGO to investigate Mr. DiNapoli's background again in conjunction with the Transfer Application. As a result, the agency continued to be unaware of Mr. DiNapoli's felony conviction, and had no reason to believe there was any significance to the fact that he was involved with Bio Energy LLC but not with Regensis.

47. DENIED-The fact that Regensis officials supplied DES with false or misleading information, as alleged more specifically in paragraphs 1-46 above, calls into question whether the company has sufficient reliability and integrity to operate a solid waste facility..

50. In a petition filed in the matter of Citizens for a Future New Hampshire v. Bio Energy, LLC, et al (Merrimack County Superior Court No. 04-E-387), a citizens group ("CFNH") whose members allegedly include property owners near the Bio Energy Facility alleges that Bio Energy did not comply with Env-Wm 303.05(d).

51. CFNH alleges that certain companies owning property abutting the Bio Energy facility are under the same or related ownership as Bio Energy, and that the owners of property beyond those parcels should have received notice as abutters. Specifically, CFNH alleges that Bedford Corp., which owned two parcels abutting the Bio Energy parcels in December 2002 when Bio Energy applied to transfer the permit to Regensis and in February 2003 when Regensis applied to modify the permit, is affiliated with and receives mail at the same address as Bio Energy and Regensis. CFNH further alleges that certain residential property owners who own property abutting the Bedford Corp. parcels should have received notice of those applications under Env Wm 303.05(d).

State's Requests for Findings of Fact and Rulings of Law-May 20, 2005

1. (Not included.)
2. Harry Smith is the person responsible for the operation of the Bio Energy Facility on a day-to-day basis, including obtaining all environmental permits. Mr. Smith is the Vice President of Operations for Bio Energy, LLC and Regensis Corporation, and was formerly the Vice President of Operations for Bio Energy Corporation.
3. William Dell'Orfano directly supervises Mr. Smith and is also very closely involved with operation and permitting of the Bio Energy Facility. Mr.

Dell'Orfano is a Managing Member of Bio Energy, LLC and the President of Regenesys Corporation, and was formerly the President of Bio Energy Corporation.

4. The purpose of the initial standard permit application filed by Bio Energy Corporation on October 9, 2001 with the DES solid waste permitting section ("initial application") was to allow the use of wood chips derived from construction and demolition debris ("C&D derived fuel") in the company's boiler. The company wanted to be able to burn this fuel in the boiler and to store it on site. The initial application did not propose to create the C&D derived fuel at the Bio Energy site.
5. Mr. Smith had extensive contact with the DES solid waste program staff in conjunction with the initial application and subsequent permits.
6. Mr. Smith and Mr. Dell'Orfano are both very familiar with DES rules and permitting procedures.
7. In connection with permitting proceedings, Mr. Smith often had the experience of going to DES with questions about how to fill out a form or interpret a rule.
8. On the solid waste permit, the Bio Energy facility is described as "a 12.5 megawatt wood-fired electric generation facility. The facility's wood fuel mix consists of whole tree chips and processed wood chips."
9. The facility required a solid waste permit because it was burning wood fuel derived from processed construction and demolition debris, a substance defined as solid waste under the solid waste rules.
10. The initial permit granted by DES on May 28, 2002 was consistent with what Bio Energy Corporation had sought in its application. Mr. Smith had no concerns when he reviewed the permit.
11. The Environmental Protection Bureau ("EPB") of the Attorney General's Office has developed Personal History and Business Concern Disclosure Statement forms for use in conjunction with background investigations under RSA 149-M:9.
12. The Personal History Disclosure forms require extensive personal information including name, date of birth, social security number, home address, home phone, physical characteristics, place of birth, citizenship, people residing with them, other legal names, drivers license, motor vehicles registered; marriage and family information including spouses, previous marriages, children, parent, siblings, other relatives in the solid waste industry; residence history

for past 20 years; education, experience, credentials, employment history for past 15 years or to age 18; business interests, equity in business concerns, type of equity and how much, management positions, business interests in family members' names; financial interests such as real estate holdings, debts owed/held, status of tax obligations, tax liens, bankruptcies; licenses, violation notices, civil litigation, and criminal proceedings.

13. The Business Concern Disclosure Statement forms require similarly extensive information about the business entity which is applying to hold a solid waste permit.
14. Martha Nickerson, who has been a paralegal with the EPB since 1992, conducted the two background investigations associated with the Bio Energy facility. Ms. Nickerson has conducted approximately 25 background investigations for the DES Waste Management Division pursuant to RSA 149-M:9, III.
15. When a background investigation is required, the completed forms are submitted directly to the EPB by the applicant or the applicant's attorney. These forms are considered confidential and remain with the Attorney General's Office after the investigation is complete. They are never sent to DES or reviewed directly by the DES staff.
16. Ms. Nickerson begins her review process by reading through all the forms. If the answer to any question is incomplete, she sends a letter requesting the missing information either to the applicant's contact person or, for the personal form, directly to that person.
17. Among other tasks, Ms. Nickerson runs a criminal record check on the State Police On-line Telecommunications System ("SPOTS") terminal for each individual who has filled out a personal history disclosure form. The SPOTS check gives nationwide information on criminal convictions for individuals.
18. Upon completion of her investigation, Ms. Nickerson prepares a background investigation report addressed to the Director of the DES Waste Management Division. The report contains information on the individuals who submitted personal history disclosure forms, and the businesses entity that submitted the business concern disclosure statement.
19. The report does not contain a recommendation, and the ultimate decision whether to grant or deny a permit rests with DES.
20. Ms. Nickerson understands that finding felony convictions is one of the central purposes of the background investigation, and it is her practice to mention in her report to DES any recent information she finds relating to such proceedings.

21. Other than the formal report, communication between the EPB and DES staff during the background investigation is mainly about timing. Ms. Nickerson does not look at the actual solid waste permit application, and does not hear back from DES after the background investigation report is sent to the Division Director.
22. The EPB's background investigation of Bio Energy Corporation started with an October 9, 2001 letter from Attorney Robert Cheney on behalf of the Corporation. The investigation was assigned to Ms. Nickerson
23. In connection with the Bio Energy Corporation background investigation, Anthony DiNapoli submitted a personal history disclosure form executed October 15, 2001, indicating among other responses that he had no criminal convictions (motor vehicle offenses excepted).
24. On November 5, 2001, Ms. Nickerson ran a SPOTS check on Mr. DiNapoli and found nothing inconsistent with his response on the form.
25. In Ms. Nickerson's experience, information is not entered on the SPOTS system until after conviction, so the system would not have contained any information on the DiNapoli indictment as of November 5, 2001.
26. On March 20, 2002, when Ms. Nickerson sent her background investigation report on Bio Energy Corporation to Waste Management Division Director Dr. Philip J. O'Brien, Mr. DiNapoli had not yet been convicted of witness tampering. Ms. Nickerson was not aware of the criminal charge against Mr. DiNapoli and did not convey any information about it to DES.
27. On December 11, 2002, Bio Energy Corporation informed the EPB that it intended to transfer the solid waste permit to Regenesiis.
28. From discussions with a Bio Energy Corporation representative in March of 2002, Ms. Nickerson was aware that the company planned eventually to transfer the permit from Bio Energy Corporation to another entity. Thus, the transfer application did not come as a surprise.
29. In his December 11, 2002, cover letter to the EPB, Harry Smith noted that "the Attorney General's Office has recently reviewed Personal History Disclosure Forms for Messes. Dell'Orfano, Smith, O'Neil and Ms. Sheehy . . . The owner and managers of Regenesiis Corporation are these same four people that have been reviewed for Bio Energy Corporation."

30. Mr. Smith's cover letter to the EPB did not mention Anthony DiNapoli, and Mr. DiNapoli did not submit a personal history disclosure form to the EPB in conjunction with the Regenesi background investigation.
31. Regenesi was the only company to submit a business disclosure form in conjunction with the second background investigation. Neither Bio Energy Corporation nor Bio Energy LLC submitted business concern disclosure forms in conjunction with the Type IV permit application.
32. In requesting the second background investigation, DES asked the EPB to investigate only Regenesi Corporation, plus the four individuals listed in Harry Smith's December 11, 2002 letter.
33. On the face of the material filed with the EPB in conjunction with the second background investigation, there was nothing to indicate that the transfer was due to anything other than routine plans formulated long before the application was filed.
34. While it was noted in Mr. Dell'Orfano's abbreviated personal history disclosure form that Bio Energy Corporation was "winding up," Ms. Nickerson saw no reason to pass this information on to DES, and did not do so.
35. Nothing Regenesi filed with the EPB mentioned Mr. DiNapoli's criminal conviction.
36. Ms. Nickerson was not aware of Mr. DiNapoli's criminal conviction at the time she completed the Regenesi background investigation, and did not convey any information about the conviction to DES.
37. DES review of solid waste permit applications focuses on the technical details of the facility, not on the background of the applicants.
38. The solid waste program would not typically communicate with other programs within DES about a permit application, instead relying on the statements of the applicant as indicated on the permit application forms.
39. During the solid waste permit application process there is typically ongoing communication between the applicant and the DES staff about the technical details of the application.
40. Standard permit language in solid waste approvals issued by DES indicates that the authorization is based on information and representations provided to the department by the permittee, and that the permit may be revoked or suspended if the information submitted is false, misleading or incomplete.

41. Trey Dykstra, a civil engineer with the DES solid waste program, was assigned to review the Type IV permit modification application filed by Bio Energy Corporation on December 11, 2002 to transfer the solid waste permit to Regenesis Corporation ("transfer application").
42. On the transfer application form, the existing permittee and the proposed new permittee are co-applicants. Both the existing permittee and the proposed new permittee must sign a certificate of compliance indicating, among other things, that no officer, director or holder of 10% or more of the entity's debt or equity has been convicted of a felony during the 5 years before the date of the application.
43. The transfer application form requires the owner of the property where the facility will be located to sign the application. By signing, the property owner affirms that the proposed new permittee has or will have the legal right to occupy and use the property, and that the property owner will grant access for closure and post-closure monitoring.
44. No background investigation or certification of compliance is required for the property owner in conjunction with a transfer application.
45. Neither the transfer application, nor any other document filed by Regenesis or Bio Energy with the DES solid waste program in conjunction with that application indicated that Bio Energy Corporation had been dissolved. Mr. Smith did not personally inform DES of this fact during the permit transfer process.
46. If the DES solid waste program had known that the permit holder had been dissolved, the agency would have had questions about whether the original permit was still valid.
47. Because the DES solid waste program was not informed of the dissolution, the agency did not have the opportunity to ask these questions at the time it was considering the transfer application.
48. In reviewing the solid waste permit transfer application, Mr. Dykstra asked Mr. Smith for information about other permits associated with the facility.
49. In response, Regenesis agent Linda Sheehy submitted a fax to Mr. Dykstra listing 3 permits. The fax did not indicate that all three permits were held by Bio Energy LLC, not Regenesis.

50. Nothing in the transfer application gave the DES solid waste program cause to question the role of Bio Energy, LLC as property owner or to inquire further into whether Bio Energy, LLC was involved in facility operations.
51. In reviewing the transfer permit application, Mr. Dykstra was curious about the fact that all the people involved in Bio Energy Corporation were the same as those involved in Regenesiis, with the exception of Mr. DiNapoli.
52. During his review of the transfer application, Mr. Dykstra asked Mr. Smith why Mr. DiNapoli was being left out of the second corporation.
53. Mr. Smith responded to Mr. Dykstra's inquiry by stating that Mr. DiNapoli was in the process of divesting himself from the facility. Mr. Smith did not mention the felony conviction, that others involved in the company had urged Mr. DiNapoli to resign, or that he had any concerns about Mr. DiNapoli whatsoever.
54. Mr. Dykstra later learned of Mr. DiNapoli's felony conviction from the newspaper.
55. The DES solid waste program was not aware of Mr. DiNapoli's conviction at the time it issued any of the three solid waste approvals associated with the Bio Energy facility.
56. Regenesiis never informed the DES solid waste program of Mr. DiNapoli's conviction.
57. The solid waste rules, specifically Env-Wm 2404, set design standards for solid waste incinerators. Among those standards is a requirement that the facility also comply with state and federal air emission standards.
58. With respect to solid waste incinerators like the Bio Energy Facility, there is substantial overlap between the requirements under the solid waste permitting program and the air emission program.
59. The Title V air permit issued for the Bio Energy facility authorizes the operation of an electric generating station designed to consume wood fuel consisting of cleaned, processed wood fuel, whole tree wood chips, or wood chips generated from C & D chips, to generate 12.65 megawatts gross of electrical power.
60. The C&D derived fuel described under the air permit is the same material as the solid waste regulated under the solid waste permit.

61. The Title V permit regulates not only the “significant activities” of operating the boiler and cooling tower, but also any “insignificant activities” at the facility which may generate air emissions.
62. The Title V permit contains facility-wide requirements that apply to both significant and insignificant activities at the facility.
63. Among the facility-wide requirements applicable to the facility are controlling fugitive dust emissions.
64. Under Env-A 1002.02, fugitive dust emissions regulated under the air permit include emissions from fuel storage and management activities.
65. The air permit also requires sampling and recordkeeping with respect to the lead content of the C & D derived fuel at the facility.
66. As a practical matter, sampling the fuel as required under the air permit requires that Bio Energy LLC employees physically go to the pile of wood chips every two hours, cut the pile into quadrants, and take samples from each quadrant.
67. Compliance with the air permit requirements requires significant and ongoing interaction with the material being managed as solid waste at the facility.
68. Based on the actual activities involved, as a practical matter, when Bio Energy, LLC “operates” the facility for purposes of the Title V permit solid waste permit, it is also “operating” the facility for purposes of the solid waste permit.
69. Mr. Dell’Orfano first learned of Mr. DiNapoli’s witness tampering conviction during a phone conversation with Tim Ferris in June of 2002.
70. Mr. Ferris was a former employee of Bio Development Corporation, a company in which Mr. Dell’Orfano and Mr. DiNapoli were both involved.
71. Mr. Ferris called Mr. Dell’Orfano to verify his previous employment. During their conversation, Mr. Ferris mentioned that he had been a witness at Mr. DiNapoli’s witness tampering trial and that Mr. DiNapoli had been convicted.
72. Mr. Dell’Orfano was outraged to learn this information from Mr. Ferris rather than from his business partner Mr. DiNapoli.
73. Mr. Dell’Orfano informed Mr. Smith and Ms. Sheehy of the conviction.

74. Soon thereafter Mr. Smith and Mr. Dell'Orfano became concerned about the impact of Mr. DiNapoli's conviction on the solid waste permit transfer.
75. Neither Mr. Smith nor Mr. Dell'Orfano ever considered bringing their concerns about Mr. DiNapoli's conviction to the attention of DES.
76. Mr. Dell'Orfano's original business plan, as outlined in the June 2002 purchase and sale agreement between Bio Energy Corporation and Bio Energy LLC, called for transferring operation of the facility, including all environmental permits held by Bio Energy Corporation, to Bio Energy LLC.
77. Pursuant to the original plan, the facility's Title V air permit was transferred in the summer of 2002 from Bio Energy Corporation to Bio Energy LLC.
78. No background investigation was required in conjunction with the transfer of the air permit.
79. After learning of Mr. DiNapoli's felony conviction, Mr. Dell'Orfano decided to transfer the solid waste permit to a new company, ultimately named Regenesis, rather than to Bio Energy LLC.
80. Mr. Dell'Orfano reached this decision after reading the solid waste rules very carefully and concluding that he could not truthfully sign the required certification with respect to Bio Energy Corporation.
81. The solid waste facility permit was the only permit originally held by Bio Energy Corporation that required a background investigation, and it was the only permit that was transferred to Regenesis rather than to Bio Energy, LLC.
82. The purchase and sale agreement between Bio Energy Corporation and Bio Energy LLC was not provided to the DES solid waste program during the solid waste permitting process.
83. The DES solid waste program was not aware during the solid waste permitting process that there had ever been any intention of transferring the solid waste permit to Bio Energy LLC, or that there had been a change in the business plan.
84. Informing the solid waste program and the EPB of the lease agreement between Renesis and Bio Energy LLC and of Mr. DiNapoli's ongoing involvement with Bio Energy LLC was meaningless without also informing them of the criminal conviction.

85. Even individuals acting as agents for Bio Energy, LLC, Bio Energy Corporation and Regensis were at times confused by the interactions between the various corporations and made mistakes such as submitting the permit transfer application on behalf of Bio Energy LLC, and using the wrong company's letterhead.
86. As of July 2002, Mr. DiNapoli was a 50% owner of Bio Energy Corporation. He was not engaged in any managerial or supervisory activity at that time. His only substantial authority was for making financial decisions.
87. At the time he resigned as a stockholder of Bio Energy Corporation, the only assets still held by the company were those permits that had not yet been transferred. All the remaining assets were now held by Bio Energy LLC.
88. Following his resignation from Bio Energy Corporation, Mr. DiNapoli remained a 50% owner of Bio Energy LLC, the entity that held the Title V air permit.
89. The only practical effect of Mr. DiNapoli's resignation from Bio Energy Corporation was to enable Mr. Dell'Orfano to make a certification on behalf of the existing permittee that was, arguably, not literally false. Otherwise, Mr. DiNapoli's involvement with the Bio Energy facility remained the same as it previously had been.
90. Bio Energy LLC paid the \$1000 solid waste permit transfer application fee.
91. Regensis has not transferred any other environmental permits from Bio Energy, LLC to itself.
92. Submission to the DES solid waste program of a request to change the name associated with a particular certified waste derived product did not eliminate the responsibility of Regensis officials to provide complete information on the subsequent solid waste permit transfer application.
93. In the context of other permit proceedings, particularly the air permit, Bio Energy, LLC repeatedly represented, or did not contradict representations by DES, that it was the operator of the facility, even after the lease with Regensis had been executed.
94. Discussion with DES regarding transfer of the air permit to Regensis did not begin until the fall of 2004, significantly after the lease with Regensis was executed.

95. Mr. DiNapoli's level of control over the facility has increased, not decreased, since execution of the lease. In addition to being a 50% owner of Bio Energy, LLC, he is now a managing member when previously he was only a member.
96. While Regenesi officials testified that their goal was to completely remove Mr. DiNapoli from involvement with the Bio Energy facility, they have not yet been successful in doing so.
97. Both the personal history disclosure forms and the business disclosure forms used by the EPB require an affidavit that the information being provided is true and complete.
98. The instructions for the forms state that it is especially important not to leave out information in a way that might create the impression that you are trying to hide it, and that a minor criminal conviction probably will not disqualify the applicant, but omitting such information from the form may result in the applicant's trustworthiness being questioned.
99. Both Mr. Smith and Mr. Dell'Orfano completed personal history disclosure forms and read the instructions on the forms.
100. Both Mr. Smith and Mr. Dell'Orfano were aware that the state viewed the failure to disclose a criminal conviction as a serious matter that could result in their trustworthiness being questioned.
101. Both Mr. Smith and Mr. Dell'Orfano were aware in December of 2002 that Mr. DiNapoli had been convicted of felony witness tampering, that personal history disclosure forms require disclosure of criminal convictions, that Mr. DiNapoli did not complete a personal history disclosure form in connection with the Type IV (transfer) application, and that no background investigation was required for Bio Energy, LLC as the property owner.
102. At the time he sent the December 2002 letter to the EPB, Mr. Smith expected that the EPB would only look at the four individuals listed in his letter.
103. Mr. Smith had no expectation that the EPB would investigate Mr. DiNapoli in conjunction with the Type IV application.
104. DENIED-In compiling and submitting the transfer application, Mr. Smith and Mr. Dell'Orfano acted with the deliberate intention of preventing DES and the EPB from discovering Mr. DiNapoli's conviction.

105. Even if it is true that Mr. DiNapoli refused to sell his interest in Bio Energy, LLC, nothing prevented Regenesis from disclosing his criminal conviction to DES.
106. Regenesis could have disclosed the conviction in a compliance report, but chose not to do so.
107. Ms. Nickerson did not learn of Mr. DiNapoli's conviction until long after she had completed both background investigations.
108. Ms. Nickerson did not convey to DES any information concerning Mr. DiNapoli's indictment, prosecution or conviction of witness tampering in either her Bio Energy or Regenesis background investigation reports.
109. While the Attorney General's Office handles all criminal appeals filed with the New Hampshire Supreme Court, the EPB is not typically involved with these appeals.
110. In her capacity as EPB paralegal, Ms. Nickerson would not have been aware of the names of defendants involved in pending criminal appeals, absent a specific reason to inquire.
111. Mr. Dell'Orfano's legal counsel had previously served as EPB bureau chief and may presumed to be generally aware of the roles of the AGO and the EPB with respect to criminal appeals.
112. Neither Mr. Smith, Mr. Dell'Orfano nor any other agent of Regenesis indicated to the EPB that they had any concern about Mr. DiNapoli, or that there was any specific reason that he was no longer involved with the company.
113. While Ms. Nickerson noticed that Mr. DiNapoli was absent from the new company, that fact by itself was not enough to trigger further inquiry.
114. Based on her prior experience in conducting background investigations, Ms. Nickerson reasonably assumed that Mr. DiNapoli's interest in the company was being bought out.
115. In view of the fact that she had completed a criminal record check of Mr. DiNapoli only a year before, and that Mr. DiNapoli was not listed as being directly involved with the company applying to be the new permit holder, it was reasonable for Ms. Nickerson not to make inquiries into Mr. DiNapoli's criminal record during the Regenesis background investigation.

116. Ms. Nickerson did make inquiries of the company during the two background investigations into other areas she found confusing, including birth date discrepancies, the relationship between the various companies, and whether the investigation was still necessary given newspaper reports that the company was closing.
117. No Regenesi official had any discussion with Ms. Nickerson about Mr. DiNapoli's criminal conviction during the background investigations.
118. DENIED-Under the circumstances, it was not reasonable for Mr. Dell'Orfano to assume that the solid waste program and the EPB were aware of Mr. DiNapoli's conviction while the transfer application was pending.
119. Ms. Nickerson first learned of Mr. DiNapoli's conviction when the EPB bureau chief received a press call inquiring about the conviction.
120. Upon learning of the conviction from the press inquiry, Ms. Nickerson reviewed her file to see how she had missed the conviction.
121. After looking at the file, Ms. Nickerson concluded that "timing was everything." Specifically, the criminal record check on Mr. DiNapoli predated his conviction, and the EPB was not asked to investigate Mr. DiNapoli in conjunction with the Regenesi background investigation.
122. When performing the Regenesi background investigation, Ms. Nickerson did not review the actual permit transfer application that had been filed with DES.
123. The permit transfer application, and specifically Mr. Dell'Orfano's certification that no officer or director of Bio Energy Corporation had been convicted of a felony, was not contained in Ms. Nickerson's background investigation files.
124. The quoted remarks of the EPB Bureau Chief in October 2003 newspaper articles are consistent with Ms. Nickerson's testimony as to her conclusions upon reviewing the EPB file after first learning of the conviction.
125. Nothing in the fall 2003 newspaper articles demonstrates that there was any agreement or commitment on behalf of the State not to take action against Regenesi based on the DiNapoli conviction. To the contrary, the statements indicate that the situation is an unusual one due to the timing of events, that the decision what to do rests with DES, and that the company would likely contest any revocation proceeding.

126. No evidence was presented that suggests that the EPB Bureau Chief was aware of Mr. Dell'Orfano's certification in the transfer application when she spoke to the press in October 2003 about Mr. DiNapoli's conviction.
127. Anthony Giunta became Waste Management Division Director in December 2003, succeeding Dr. O'Brien.
128. As Director, Mr. Giunta was responsible for making the decision to institute this permit revocation proceeding.
129. In early 2004, soon after Mr. Giunta started as Division Director, he was involved with hearings on proposed legislation aimed at stopping the Bio Energy facility due to neighbors' concerns. Representing DES at the legislative hearings, Mr. Giunta, like Regenesis officials, testified against the legislation.
130. From Mr. Giunta's perspective, it was the CFNH lawsuit that first spelled out the concerns that ultimately led DES to issue the notice of proposed revocation.
131. The CFNH lawsuit alleged, among other things, that in December 2002 Mr. Dell'Orfano certified under oath that the existing permittee, Bio Energy Corp., had not had any member, officer or director convicted of a felony within 5 years when in fact Mr. DiNapoli had been convicted of a felony less than a year before.
132. There was no evidence presented to suggest that CFNH brought the allegations summarized above to the State's attention prior to filing the lawsuit in October 2004.
133. The failure of Regenesis officials to disclose Mr. DiNapoli's conviction directly to the agency eroded the trust that had been established between the company and DES.
134. Trust between companies like Regenesis and DES is critically important given the level of public concern about the environmental and public health impacts of such facilities, and the fact that it is impossible for the agency to monitor the facility 24 hours a day.
135. The importance of trust between the agency and the permit holder is the reason RSA chapter 149-M includes language about reliability and integrity.
136. Regenesis concocted an elaborate scheme which was purportedly aimed at removing Mr. DiNapoli from involvement in the operation of the Bio Energy facility.

137. DENIED-Whether Regenesys' scheme for removing Mr. DiNapoli would have satisfied the DES solid waste program is not relevant to this proceeding.
138. The DES solid waste program was never informed of the purpose of the scheme, and therefore had no opportunity to assess whether it complied with the solid waste rules and statute.
139. Regenesys was on notice that DES and the EPB were relying on the truth and accuracy of its representations.
140. Both Mr. Smith and Mr. Dell'Orfano read, signed and understood multiple DES and EPB forms which clearly explained that a lack of candor in the permitting process could lead to denial or revocation of the solid waste permit.
141. There is no evidence that either DES nor the EPB ever made any statement upon which Regenesys could reasonably rely as an indication that state officials fully understood, and approved of, the approach the company had taken to "removing" Mr. DiNapoli from operations at the Bio Energy facility.
142. At most, the DES and EPB press statements indicate a desire to work with the company and treat it fairly, and a defense of the agency's decisions to grant permits as having a sound technical basis.
143. Mr. Smith failed to disclose Mr. DiNapoli's conviction even when he was asked a direct question by the staff person reviewing the transfer application about why Mr. DiNapoli was not involved with the new company.
144. In light of the fact that the whole purpose of the transfer to Regenesys was to remove Mr. DiNapoli from facility operations, Mr. Smith's answer to Mr. Dykstra's question was evasive, incomplete and misleading.
145. Regenesys officials' failure to note in response to Mr. Dykstra's inquiry that the other facility permits were held by a different company, in which Mr. DiNapoli was still involved, was misleading.
146. Mr. Smith's submission of a carefully worded letter to the EPB which gave the impression that the officers and key employees for Regenesys were the same as for Bio Energy was misleading.
147. Mr. Dell'Orfano's certification of compliance on behalf of Bio Energy Corporation, which he knew was prevented from being an abject falsehood only by the technical fact of Mr. DiNapoli's resignation, was highly misleading.

148. Knowing of the existence of felony convictions during its consideration of solid waste facility is critically important to DES.
149. It was not reasonable for Regenesis to expect DES to piece together all the facts that have now been placed before the hearing officer, simply because various pieces of potentially relevant information were scattered throughout various agency files.

B. REGENESIS REQUESTS (Numbered as in requesting document)

Respondent's Proposed Findings of Fact and Conclusions of Law-May 20, 2005

1. The Bio Energy facility is located in West Hopkinton, New Hampshire.
2. In the past, it has generated electricity by burning wood chips.
3. Currently, it is in an extended period of maintenance. See Day 2 Transcript at II-98.
4. On October 9, 2001, Bio Energy Corporation applied for a Solid Waste Standard Permit to incinerate wood chips derived from waste wood material that has been separated from other demolition debris. See Exhibit 5; Intervenor's Exhibit 7 (Volume 1).
5. It received the Standard Permit on May 28, 2002. See Exhibit 13.
6. Bio Energy Corporation applied to transfer its Standard Permit to Regenesis Corporation on December 11, 2002. See Exhibit 15.
7. That transfer was granted on March 28, 2003. See Exhibit 16.
8. On February 14, 2003 Regenesis applied for a Type IA modification to the Solid Waste Permit. See Intervenor's Exhibit 86 (Volume 4).

9. Prior to August 29, 2002, there were two shareholders of Bio Energy Corporation, William Dell'Orfano and Anthony DiNapoli, who each owned 50% of the shares of Bio Energy Corporation. See Day 3 Transcript at III-33 to -34.

10. Prior to August 29, 2002, William Dell'Orfano was President and Director of Bio Energy Corporation and Anthony DiNapoli was Treasurer and Director. See id.

11. After August 29, 2002, William Dell'Orfano was sole shareholder, director, and officer of Bio Energy Corporation. See id. at III-34 to -35, -38.

12. Bio Energy, LLC was formed in January 2002. See id. at -39; see also Exhibit 19.

13. Since that time Bio Energy, LLC has had two members, Anthony DiNapoli and William Dell'Orfano, who each hold 50% membership interests. See id. at -65; -73.

14. Regenesis Corporation received a certificate of authority to do business in New Hampshire on January 21, 2003, see Day 3 Transcript at III-64; Exhibit 59 (SPBG0568).

15. Pursuant to a December 6, 2002 Operating Lease between Bio Energy, LLC and Regenesis Corporation, see Exhibit 39, once the facility resumed generating electricity Regenesis Corporation would conduct all operations at the facility. See id. at III-51 to -52.

16. At all times relevant to this matter, William Dell'Orfano has been Regenesys Corporation's President, sole shareholder, and sole director. See Exh. 59 (SPBG0569); see also Day 3 Transcript at III-58 to -59.

17. On March 25, 2002, Anthony DiNapoli was convicted of felony witness tampering in Hillsborough County Superior Court. See Exhibit 17.

18. Mr. DiNapoli appealed his conviction. See State v. DiNapoli, 149 N.H. 514 (2003).

19. The Attorney General's office represented the State in that appeal. See id. at 515; see also Day 3 Transcript at III-62.

20. The New Hampshire Supreme Court affirmed the conviction on May 16, 2003. See State v. DiNapoli, 149 N.H. at 514.

21. Mr. Dell'Orfano learned of the conviction sometime in the middle of June 2002. See Day 3 Transcript at III-5 to -6.

22. Upon learning of the conviction, Mr. Dell'Orfano resolved to remove Mr. DiNapoli from Bio Energy Corporation and formally preclude him from any involvement with the facility. See id. at -10 to -11, -45 to -47.

23. Mr. DiNapoli resigned from his positions as treasurer and director of Bio Energy Corporation as of August 29, 2002. See Exhibit 35.

24. Mr. DiNapoli's returned all of his shares in Bio Energy Corporation as of August 29, 2002. See id.

25. DENIED-Mr. DiNapoli had no involvement with facility operations after his resignation. See Day Transcript at I-244 to -245; Day 2 Transcript at II-71, II-79 to -80; Day 3 Transcript at III-47 to -48.

26. Bio Energy Corporation as the existing permittee and Regenesi Corporation as the proposed permittee applied for a Type IV Permit Modification ("Transfer Application") on December 11, 2002. See Exhibit 15 at 15-1.

27. In Attachment IV(2)(f) of the Transfer Application, William Dell'Orfano is listed as a manager and Anthony DiNapoli is listed as a member of Bio Energy, LLC, the property owner. See id. at 15-34.

28. On December 6, 2002, Mr. Dell'Orfano certified in the Transfer Application that none of the following had been convicted of or pleaded guilty or no contest to a felony during the five years before the date of the application (1) the existing permittee, (2) the existing facility owner, (3) the existing facility operator, (4) all individual or entities holding 10% or more of the existing permittee's debt or equity, (5) all of the existing permittee's officers, directors and partners, and (6) all individuals and entities having managerial, supervisory or substantial decision-making authority and responsibility for the management of facility operations. See id. at 15-24 to -25.

29. On December 6, 2002, Mr. Dell'Orfano also certified in the Transfer Application that none of the following had been convicted of or pleaded guilty or no contest to a felony during the five years before the date of the application: (1) the proposed new permittee, (2) the individual or entity who will be the facility owner, (3) the individual or entity who will be the facility operator, (4) all individual or entities holding 10% or more of the proposed new permittee's debt or equity, (5) all of the proposed new permittee's officers, directors and partners, and (6) all individuals and entities having managerial, supervisory or substantial decision-

making authority and responsibility for the management of facility operations following permit transfer. See id. at 15-25 to -26.

30. DENIED-All of those certifications were true. See Day 3 Transcript at III-58 to -59 (testimony of William Dell'Orfano); id. at III-227 to -228 (testimony of Anthony Giunta); id. at III-276 (State's Closing Argument); see also Exhibit 63 (statement by Attorney Patterson that "there was not a misrepresentation of the facts").

31. In connection with the transfer permit application, the Attorney General's Office conducted a background investigation of certain individuals involved with the facility, including William Dell'Orfano. See Day 1 Transcript at I-66.

32. Pursuant to that investigation, Mr. Dell'Orfano submitted an abbreviated personal history disclosure form to the Attorney General's office on February 7, 2003. See id. at -68; see also Exhibit 41.

33. In that form, he disclosed that Bio Energy Corporation was winding up. See Exhibit 41 at "Page 10".

34. In a further submission on March 19, 2003, Mr. Dell'Orfano disclosed that Anthony DiNapoli was a 50% owner of various companies, including Bio Energy, LLC. See Exhibit 59 at SPBG0569.

35. On September 28, 2001, prior to filing its Standard Permit Application, Bio Energy Corporation sent by certified mail a Notice of Intent to File a Standard Permit Application to the following entities: Petrofiber Corp., Papertech,

Inc., and USA- Hopkinton Everett Reservoir. See Exhibits 43-44; Stipulated Facts as to Abutter Notification Issues, ¶ A.2.

36. On September 28, 2001, prior to the filing, Bio Energy Corporation had hand-delivered a Notice of Intent to File a Standard Permit Application to the following entities: Hopkinton-Webster Solid Waste District, Town of Hopkinton Selectmen, Town of Hopkinton (Town Clerk). See Exhibits 43, 45; Stipulated Facts as to Abutter Notification Issues, ¶ A.2.

37. Thus, prior to the filing of the Standard Permit Application, Bio Energy Corporation sent to every abutter to the facility, save CHI Energy, Inc., a Notice of Intent to File. See Transcript Day III at III-234; see also Exhibits 43, 55; Transcript at III-237 (explaining color coding of tax map).

38. Linda Sheehy was an employee of Bio Energy Corporation in 2001. See Day 3 Transcript at III-232.

39. In December 2001, Ms. Sheehy discovered that Bio Energy Corp. had inadvertently failed to provide one abutter, CHI Energy, Inc., with a Notice of Intent to File. See id. at III-234.

40. She called Michael McCluskey, an employee of the Solid Waste Division of DES, on December 4, 2001, and asked what Bio Energy Corporation should do to provide adequate notice under the Solid Waste Rules. See id. at III-235.

41. He instructed her to send by certified mail a Notice of Intent to File to CHI Energy, Inc. See Id.

42. Ms. Sheehy did so. See id.; see also Exhibit 44.

43. In addition, Ms. Sheehy had the Notice of Intent to File hand-delivered to Jim Gagne, an employee of CHI Energy, Inc. See Day 3 Transcript at III-235 to -236; see also Exhibits 45, 62 (Gagne's acknowledgement of receipt).

44. Ms. Sheehy informed Mr. McCluskey by telephone of the hand-delivery and was told Bio Energy Corporation had fulfilled its notice obligations with respect to the Notice of Intent to File the Standard Permit Application. See Day 3 Transcript at III-237.

45. Bio Energy Corporation gave all direct abutters notice of the public hearing relative to the Standard Permit Application. See Exhibits 43, 46-47.

46. Bio Energy Corporation notified all direct abutters of the transfer permit and Type IA modification application. See Exhibits 43, 48-51; Stipulated Facts as to Abutter Notification Issues, ¶¶ B.2, C.2.

47. Neither the facility owner, Bio Energy, LLC, nor the applicants in the transfer and Type IA modification application (Regenesis Corporation and/or Bio Energy Corporation) owned any of the parcels of land abutting the facility. See Transcript Day 3 at III-66 to -68.

48. As early as October 2003, news stories concerning Mr. DiNapoli's conviction surfaced. See Exhibits 61, 63-64.

49. DES officials in the Solid Waste Division became aware that Mr. DiNapoli had been convicted almost immediately thereafter. See Exhibit 61 (newspaper article with distribution list of Solid Waste officials); see also Exhibit 65 (explaining that Exhibit 61 was copied from DES files).

50. The Attorney General's office knew of the conviction months earlier, given its role in representing the State in Mr. DiNapoli's appeal to the New Hampshire Supreme Court. See State v. DiNapoli, 149 N.H. 514, 515 (2003).

51. Notwithstanding its knowledge of Mr. DiNapoli's conviction, DES, as represented by the Attorney General's office, did not commence this revocation proceeding until over a year later. See Notice of Proposed License Action.

C. REACH'S REQUESTS (Numbered as in requesting document)

*REACH's Summary of and Proposed Findings of Fact and Conclusions of Law-
May 20, 2005*

1. Bio Energy Corporation was the owner and operator of a wood-fired co-generation facility located in West Hopkinton, New Hampshire (hereinafter the "Bio Energy Facility"), and held all related environmental permits, from on or around its development and inception in 1982 through June, 2002. (Testimony of H. Smith, Day 1, p. 235); (Testimony of W. Dell'Orfano, Day 3, pp. 31-34).
2. At all times during that 1982 through June, 2002 period, Bio Energy Corporation was owned on a 50/50 basis by William Dell'Orfano and Anthony DiNapoli, who were officers, directors and shareholders of that corporation. (Testimony of W. Dell'Orfano, Day 2, pp. 208-12; Day 3, pp. 33-35).
3. The Bio Energy Facility was also developed and managed until 2003 by Bio Development Corporation, which at all times was owned on a 50/50 by William Dell'Orfano and Anthony DiNapoli, who were officers, directors and shareholders of that corporation. (Testimony of H. Smith, Day 2, pp. 109-10).
4. Currently, the land on which the Bio Energy Facility is located is owned by Bio Energy LLC, Petrofiber Corporation, and The Bedford Corporation, all of which are owned on a 50/50 basis by William Dell'Orfano and Anthony DiNapoli, who are the principals (whether officers, directors, shareholders and/or members) of each of those entities respectively. (Testimony of H. Smith, Day 2, pp. 70-71).
5. Petrofiber Corporation also operates a facility in close proximity to the Bio Energy Facility, which previously supplied fuel to the Bio Energy

Facility, and which presently holds a solid waste permit from NHDES. The land on which Petrofiber Corporation operates this solid waste facility is owned by AD&WD Land Corporation, which is owned on a 50/50 basis by William Dell'Orfano and Anthony DiNapoli, who are officers, directors and shareholder of that corporation. (Testimony of H. Smith, Day 2, pp. 137-39).

6. By a Purchase and Sale Agreement (hereinafter the "P&S Agreement") dated June 12, 2002, William Dell'Orfano and Anthony DiNapoli purported to transfer all of Bio Energy Corporation's assets, including all rights, titles, benefits and interest in its property, equipment and environmental (including solid waste) permits, from the corporation to Bio Energy LLC, with the foregoing ultimately remaining within the care and control of the same two principals. Specified on the schedule of permits to be transferred by the P&S Agreement was Bio Energy Corporation's solid waste permit. (Testimony of H. Smith, Day 1, pp. 211-13, 236-239; Day 2, pp. 36-46, 114-20, 145); (Testimony of W. Dell'Orfano, Day 3, pp. 41-44).
7. Related the June 12, 2002 P&S Agreement, Bio Energy Corporation began the process of transferring all of its environmental and other operating permits and licenses/certification for the Bio Energy Facility from the corporation to the new-formed Bio Energy LLC; specifically a Title V air permit, a NPDES permit, an EPA hazardous waste identification number, software licenses, above ground storage tank permits, a PSNH operating/interconnect agreement, and certified waste derived product certification, given that the intent of William Dell'Orfano and Anthony DiNapoli around that time was to transfer all ownership, control and assets related to the Bio Energy Facility from Bio Energy Corporation to Bio Energy LLC. Bio Energy LLC was, and has been at all times, owned on a 50/50 basis by William Dell'Orfano and Anthony DiNapoli. (Testimony of H. Smith, Day 1, pp. 229-30; Day 2, pp. 50-57, 89); (Testimony of W. Dell'Orfano, Day 3, pp. 73-80, 86, 114-16); Respondent's Answer at ¶ 20.
8. Despite the foregoing P&S Agreement between, and related transfers from, Bio Energy Corporation to Bio Energy LLC in June, 2002, by a Notice of Filing of Type IV Permit Modification dated July 3, 2002, Bio Energy Corporation was described as the owner and operator of the Bio Energy Facility to NHDES, and the same was represented to the Town of Hopkinton and abutters in December, 2002. (Testimony of H. Smith, Day 2, pp. 164-170).
9. In midst of the aforementioned transfer project from Bio Energy Corporation to Bio Energy LLC, specifically in mid-June, 2002, William Dell'Orfano learned that Anthony DiNapoli had been convicted of felony witness tampering, relating to an underlying civil case in which William

Dell'Orfano was also involved (as a principal of co-defendant Bio Development Corporation, along with Anthony DiNapoli), and in which he sat for a deposition and was defended by the same attorney who represented Anthony DiNapoli. William Dell'Orfano alleges that he was very upset and outraged upon learning of this felony conviction and what he perceived to be deception by Mr. DiNapoli, a business partner. William Dell'Orfano desired to have Anthony DiNapoli removed from any involvement with the Bio Energy Facility after learning that he had been convicted of a felony. (Testimony of H. Smith, Day 1, pp. 245-47; Day 2, pp. 58-60); (Testimony of W. Dell'Orfano, Day 2, pp. 222-27; Day 3, pp. 6-7, 28-30, 46).

10. William Dell'Orfano previously told a reporter that he had learned of Anthony DiNapoli's felony conviction in April, 2002, which was reported in a periodical, but now claims that he misspoke regarding this issue. (Testimony of W. Dell'Orfano, Day 2, pp. 232-43; Day 3, p.80).
11. William Dell'Orfano and his staff realized that the aforementioned felony conviction posed a significant problem, given the pre-existing plan and ongoing effort to transfer the solid waste permit for the Bio Energy Facility from Bio Energy Corporation to Bio Energy LLC, since that process would require the filing of a compliance report to explain the conviction of a principal in that the certification requirements could not be satisfied with Anthony DiNapoli remaining involved in his roll at the facility. Concluding that this was a major problem, Harry Smith consulted the NHDES solid waste regulations, and urged William Dell'Orfano to separate himself and the facility from Mr. DiNapoli. Mr. Smith realized that there were problems with the current state of affairs in light of the requirements of NHDES Regulations Env-Wm 303.14(a)(4),(5)&(6). William Dell'Orfano also studied the relevant regulations and concluded that they had a problem given the felony conviction. They realized that one option was to submit a compliance statement to NHDES given that the certification could not be truthfully made, but the decision regarding how to proceed was left to William Dell'Orfano. William Dell'Orfano knew that Anthony DiNapoli's felony conviction posed serious problems relative to the ongoing licensure of the Bio Energy Facility, and that he had to get Anthony DiNapoli out of involvement with the said Facility. William Dell'Orfano changed his mind about transferring the solid waste permit to Bio Energy LLC, instead devising a plan to transfer the solid waste permit to a new entity, previously unrelated to the Bio Energy Facility, to be called Regenesi Corporation. (Testimony H. Smith, Day 1, pp. 232-33, 241-45; Day 2, pp. 56, 60-61, 65-66, 70-77, 120-134); (Testimony of W. Dell'Orfano, Day 3, pp. 7-10, 17, 44-45, 56, 68, 80-82, 97, 167-68).

12. William Dell'Orfano realized that the felony conviction of his business partner was a relevant issue that had to be dealt with for purposes of complying with the NHDES solid waste regulations. (Testimony of W. Dell'Orfano, Day 3, pp. 82-83).
13. William Dell'Orfano realized that the disclosure of Anthony DiNapoli's conviction might complicate the transfer of the solid waste permit to Bio Energy LLC. (Testimony of W. Dell'Orfano, Day 3, p. 81).
14. William Dell'Orfano believed that "it was the spirit and intent" of the solid waste rules that, because he was convicted of a felony, NHDES would not likely want Anthony DiNapoli involved with the Bio Energy Facility. (Testimony of W. Dell'Orfano, Day 3, p. 81).
15. William Dell'Orfano previously told a reporter that he did not feel that Anthony DiNapoli's conviction was relevant and that is why he did not provide notice to NHDES upon learning about it, which was reported in a periodical. (Testimony of W. Dell'Orfano, Day 3, pp. 83-86).
16. William Dell'Orfano believed that the issues surrounding whether and how Anthony DiNapoli's felony conviction implicated the NHDES solid waste regulations, and the best course of action in response to his notice of the conviction, were complicated and required detailed study and analysis of the regulations and their various legal requirements. William Dell'Orfano spent a significant amount of time studying the NHDES regulations and requirements related to transfer of solid waste permit and related certifications, and believed that he fully understood the language and requirements thereof. (Testimony of H. Smith, Day 2, pp. 54, 62); (Testimony of W. Dell'Orfano, Day 2, pp. 54-57, 62, 217-21; Day 3, pp. 7-9, 14-17, 45, 53).
17. After detailed study, consideration and consultation, William Dell'Orfano decided in the Fall of 2002 that the best course of action was to involve a new corporation (which was a pre-existing, relatively inactive Delaware corporation held by Mr. Dell'Orfano and previously uninvolved with the Bio Energy Facility) to hold the solid waste permit, to be called Regenesiis, although it was not registered to do business in New Hampshire until January, 2003. Mr. Smith testified: "In order to avoid the problems that resulted from disclosing Mr. DiNapoli's criminal conviction on the solid waste transfer permit, Mr. Dell'Orfano involved yet another company he owned, leasing the assets to it, and then listing it as the proposed operator." (Testimony of H. Smith, day 1, pp. 248-49; Day 2, pp. 142-44, 173-74); (Testimony of W. Dell'Orfano, Day 3, pp. 97-98).
18. Regenesiis Corporation was to be utilized in order to avoid the problems which would result from disclosing Anthony DiNapoli's criminal

conviction to NHDES on the solid waste transfer permit absent involvement of this new entity. (Testimony of W. Dell'Orfano, Day 3, pp. 94-95).

19. As part of the resulting plan, Anthony DiNapoli also turned in his shares of Bio Energy Corporation, resigned as officer and director thereof, and the corporation was immediately dissolved the corporation effective August 31, 2002. These steps were taken even though, at this time, Bio Energy Corporation had sold all of its assets to Bio Energy LLC, was not intended to play any future roll in the Bio Energy Facility, and its shares were effectively worthless. (Testimony of H. Smith, Day 1, pp. 247-48; Day 2, pp. 70-77); (Testimony of W. Dell'Orfano, Day 3, pp. 10, 169-71; Day 3, pp. 34-39, 48, 73).
20. The only significance of this divestiture of Anthony DiNapoli from Bio Energy Corporation was for purposes of the December, 2002 certification to NHDES in conjunction with the Type IV solid waste permit transfer application. (Testimony of W. Dell'Orfano, Day 3, pp. 170-73).
21. Although the Type IV solid waste permit transfer ostensibly transferred the solid waste permit from Bio Energy Corporation to Regenesys Corporation, as of the date of that application, Bio Energy Corporation had dissolved as a corporation and its principals had indicated by corporate resolution that it was to have been wound up (as of August 31, 2002). (Testimony of H. Smith, Day 2, pp. 46-47, 146-49); (Testimony of W. Dell'Orfano, Day 3, pp. 100-03).
22. No agent of any of the entities or individuals associated with the Bio Energy Facility notified NHDES of the dissolution of Bio Energy Corporation, the existence or effects of the P&S Agreement between Bio Energy Corporation and Bio Energy LLC, or the fact that various other permits related to the Bio Energy Facility were now held by a new entity called Bio Energy LLC. (Testimony of Trey Dykstra, Day 2, pp. 192-98); (Testimony of H. Smith, Day 1, p. 227).
23. Another aspect of the resulting plan has involved Bio Energy LLC owning a significant portion of the property for the Bio Energy Facility, which took effect by operation of the P&S Agreement dated June 12, 2002, reaffirmed by the lease dated December 15, 2002, and which remains in effect up to the present. Mr. Dell'Orfano testified that this aspect of the plan entailed that "[s]pecifically the asset [of the Bio Energy Facility] itself would sit in Bio Energy, LLC." (Testimony of W. Dell'Orfano, Day 3, pp. 48, 51).
24. Another aspect of the resulting plan has involved Bio Energy LLC funding all maintenance, improvements, construction and operations for the Bio

Energy Facility, by operation of the lease dated December 15, 2002, and which remains in effect up to the present. It is alleged that although Bio Energy funds these activities, Regenesis implements all such activities. (Testimony of H. Smith, Day 1, pp. 130-41, 250-53; Day 2, pp. 68, 79-86; (Testimony of W. Dell'Orfano, Day 3, pp. 48-49, 197-200).

25. Another aspect of the resulting plan has involved Bio Energy LLC deriving and realizing all profits and proceeds from operations and activities at the Bio Energy Facility (including any value derived from the existence of the solid waste permit for the Facility), by operation of the lease dated December 15, 2002, and which remains in effect up to the present. (Testimony of H. Smith, Day 2, pp. 83-84); (Testimony of W. Dell'Orfano, Day 3, pp. 129-33).
26. William Dell'Orfano allegedly believed that his plan created a state of affairs requiring no disclosure of Anthony DiNapoli's felony conviction to NHDES and allowing him to make the necessary certifications in conjunction with the December, 2002 permit transfer application. Mr. Dell'Orfano testified: "[W]ith *the intent* of removal of Mr. DiNapoli completely with any involvement with this project, the rules were very specific for me." (emphasis added). Mr. Dell'Orfano further testified: "[A]t the conclusion of my realization of Mr. DiNapoli's involvement was a real problem going forward, I had to restructure.... I think the most important piece of this puzzle was Mr. DiNapoli was never to be involved with any operational characteristic of this facility..." (Testimony of W. Dell'Orfano, Day 2, pp. 57, 63-65; Day 3, pp. 15, 47).
27. When he made the December, 2002 certifications to NHDES, William Dell'Orfano knew that Anthony DiNapoli was a convicted felon. (Testimony of W. Dell'Orfano, Day 2, pp. 220-221).
28. William Dell'Orfano alleges that he believed that Anthony DiNapoli would be investigated by state authorities in conjunction with the December, 2002 permit transfer, even though no mention was made of him in any certification or disclosure to NHDES, and correspondence from Harry Smith to NHDES suggested that the individuals to be investigated by the state were the same as those previously disclosed and investigated in conjunction with a prior application. William Dell'Orfano knew that he had not disclosed Anthony DiNapoli on the application and that no personal history statement was being submitted for Mr. DiNapoli. William Dell'Orfano believed, however, that the state authorities knew of Mr. DiNapoli's conviction, given that as of September 17, 2002, he understood that the Attorney General's Office had handled Mr. DiNapoli's criminal appeal case. (Testimony of W. Dell'Orfano, Day 3, pp. 19-21; 62-63; 180-83; 200-01).

29. In the process of examining his options and completing the necessary documentation for submission to NHDES regarding the December, 2002 permit transfer, William Dell'Orfano consulted with legal counsel, Attorney Robert Cheney, former long-time employee of the New Hampshire Department of Justice's Office of the Attorney General, and former Chief of that office's Environmental Protection Bureau, regarding these issues. Attorney Cheney reviewed the permit transfer form prior to William Dell'Orfano signing and submitting it. (Testimony of W. Dell'Orfano, Day 2, p. 218; Day 3, pp. 4, 70-72, 175-76).
30. Neither William Dell'Orfano, nor anyone at his direction, ever contacted or consulted with NHDES in order to disclose, or seek clarification or guidance regarding, the complicated issues associated with Mr. DiNapoli's felony conviction as it related to compliance with NHDES solid waste regulations. (Testimony of H. Smith, Day 1, p. 233); (Testimony of W. Dell'Orfano, Day 2, pp. 221-22; Day 3, pp. 16-17).
31. William Dell'Orfano never even considered disclosing Anthony DiNapoli's felony conviction to NHDES. (Testimony of W. Dell'Orfano, Day 3, p. 173).
32. It had been the practice of those employees and agents affiliated with the Bio Energy Facility with responsibility for compliance with NHDES regulations and law, to regularly consult with the agency on ambiguous areas of the law or with questions regarding how to complete forms and ensure compliance. Mr. Dell'Orfano testified: "...[W]hen we get to those fuzzy areas, we ask the DES what they think about this or that..." For instance, the moment that it was discovered that *one* abutter had not been provided proper notice on one occasion, Linda Sheehy immediately called NHDES to inform the agency of the issue, prior to taking corrective action, in order to provide notice, seek guidance and obtain approval from the NHDES contract person for the applicable regulatory requirements. (Testimony of H. Smith, Day 1, p. 232); (Testimony of W. Dell'Orfano, Day 3, p. 51); (Testimony of L. Sheehy, Day 3, pp. 234-37).
33. William Dell'Orfano believes that he and his staff have had a good relationship with NHDES. (Testimony of W. Dell'Orfano, Day 3, pp. 4-5).
34. In conjunction with the foregoing events, William Dell'Orfano certified on December 2, 2005, under oath, *inter alia*, that no person with managerial responsibility for the solid waste facility or activities had been convicted of a felony for the past five years, and signed for all necessary signatories to the application: Bio Energy Corporation, Bio Energy LLC and Regensis Corporation. William Dell'Orfano had familiarized himself with the standards and requirements for these certifications and associated

disclosure requirements, and had made such certifications previously for both the Bio Energy Facility and Petrofiber Corporation. (Testimony of W. Dell'Orfano, Day 2, pp. 213-16; 219-20; Day 3, pp. 57-59).

35. Upon receipt and initial review of the December, 2002 permit transfer application, NHDES personnel noticed that the individuals associated with the proposed pre and post-transfer entities were identical but for Anthony Dinapoli who was, apparently, not going to be involved following transfer. A telephone inquiry was made by NHDES, at which time Harry Smith indicated that Anthony Dinapoli was not going to be involved with the Bio Energy Facility any longer. (Testimony of Trey Dykstra, Day 2, pp. 196-97).
36. NHDES personnel did not learn of Anthony Dinapoli's felony conviction until it was reported long after the December, 2002 permit transfer application, in the press and by means of a civil suit filed by Citizens for a Future New Hampshire. (Testimony of Michael Guilfooy, Day 1, pp. 157-58); (Testimony of Trey Dykstra, Day 2, p. 199); (Testimony of Tony Giunta, Day 3, pp. 220-21).
37. William Dell'Orfano claims that he wanted Anthony Dinapoli out of Bio Energy LLC, which is why he chose to take the aforementioned course of action (regarding the transfer of the solid waste permit to Regenesys Corporation, etc.) versus filing a compliance statement with NHDES disclosing the felony conviction. Mr. Dell'Orfano testified: "I think the most distraught part of this whole issue is I was so angry that I just didn't want him involved at all. And I didn't even want to do a compliance report...I think the worst thing that could have happened is that he would have still been a part of this operation. He had breached a trust with me, which was just never going to allow to resurface again. And a compliance report might have possibly allowed him to stay. I didn't want him there. I restructured this operation in such a way that he had to be removed." Mr. Dell'Orfano further testified: "I felt that getting rid of Mr. Dinapoli, removing him completely from this operation, would have satisfied the DES upon an investigation of that issue.... I think what I acted as getting rid of Mr. Dinapoli was the enforcement of that trust [with DES]. That's what I wanted to do, is to protect this whole concept, in making sure that Mr. Dinapoli was not involved at all. That's where I was." Mr. Dell'Orfano further testified: "It was my belief that the structure that I had put in place met all of the requirements of the DES, and that—that everything that took place with my effort to remove Mr. Dinapoli was in the spirit of making sure that he was not involved with this facility." (Testimony of H. Smith, Day 2, p. 185); (Testimony of W. Dell'Orfano, Day 3, pp. 10-12, 56-57, 87-88, 177-79, 184, 203).

38. However, it is uncontroverted that Anthony Dinapoli has, in fact, remained a director, officer and member (indeed subsequently a managing member) of Bio Energy LLC (in addition to Petrofiber Corporation, The Bedford Corporation and AD&WD Land Corporation), along with William Dell'Orfano, as of December 2, 2002, even up to the present. (Testimony of H. Smith, Day 1, p. 234; Day 2, pp. 135-37); (Testimony of W. Dell'Orfano, Day 3, pp. 52-53, 86, 168-69); Respondent's Answer at ¶ 22.
39. Documentation, representations and events since the formation of Bio Energy LLC, up through the present, demonstrate that this entity—of which Anthony Dinapoli has been a principal at all times—has been integrally involved in a wide variety of operational issues relating to the Bio Energy Facility, including many functions and aspects relating to the systems and physical structures for the collection, separation, storage, transfer, processing, treatment, or disposal of solid waste, including:
- A. Holding the Title V air permit for the Bio Energy Facility. Additionally, on multiple occasions, representing to regulators and others, including representations under oath, that Bio Energy LLC operates the Title V facility at the Bio Energy Facility (including systems and structures designed to consume wood fuel consisting of cleaned, processed wood fuel, whole tree wood chips, or wood generated from C&D debris, C&D chips, to generate 12.65 megawatts gross of electrical power, and entailing such significant activities as boiler and the cooling tower, and insignificant activities at the facility covered by the permit, to include total facility emissions). This permit also requires specific requirements regarding control of emissions from fugitive dust, performance test results for C&D chips fed into the boiler, annual lead stack test results for C&D chips fed into the boiler, laboratory results for metals testings of monthly composite C&D chips fed into the boiler, monthly C&D chip certifications from each supplier to the Bio Energy Facility, or copies of monthly analysis from Bio Energy LLC of the incoming C&D wood chip composite samples collected by Bio Energy LLC and sent out for analysis, summary of monthly C&D wood chip analysis of chips fed into the boiler, summary of monthly C&D wood chip certifications for C&D chips received at the facility, or summary of monthly C&D chips analysis conducted by Bio Energy LLC for C&D chips received at the facility from each supplier of C&D chips. Bio Energy allegedly performs all Title V-related work “at the direction of” Regenesys Corporation. (Testimony of H. Smith, Day 1, pp. 215-22; Day 2, pp. 92-96).
- B. Holding the NPDES permit for the Bio Energy Facility and undertaking to perform a wide variety of related permit

- obligations. (Testimony of H. Smith, Day 2, pp. 89-92, 186); (Testimony of W. Dell'Orfano, Day 3, p. 113).
- C. Certifying and swearing to the accuracy of a GZA Report for Title V Renewal Operating Application, sworn by Dell'Orfano, indicating that Bio Energy LLC is the operator of the Title V facility at the Bio Energy Facility. (Testimony of H. Smith, Day 2, pp. 151-57); (Testimony of W. Dell'Orfano, Day 3, pp. 120-26).
 - D. Receiving by transfer the certified solid waste derived product certification. (Testimony of W. Dell'Orfano, Day 3, pp. 114-16).
 - E. Submitting multiple forms and representations to NHDES, regarding the Title V permit, referencing only Bio Energy LLC operating the Bio Energy Facility without mention of Regenesys Corporation. (Testimony of H. Smith, Day 2, pp. 57-160); (Testimony of W. Dell'Orfano, Day 3, pp. 116-20; Day 3, pp. 147-48).
 - F. Receiving by transfer PSNH agreements. (Testimony of W. Dell'Orfano, Day 3, pp. 126-29).
 - G. Referencing in internal corporate governance documentation, between and among William Dell'Orfano and Anthony Dinapoli, the fact that Bio Energy LLC operates the Bio Energy Facility and the conceptualization of the solid waste permit as an asset of the Bio Energy Facility from which Bio Energy LLC derives value and benefit. (Testimony of H. Smith, Day 2, pp. 160-63); (testimony of W. Dell'Orfano, Day 3, pp. 129-33).
 - H. Representing, through the same legal counsel as retained for environmental compliance and this permit action, in some cases verified under oath, and up through recent times, that Bio Energy LLC operates the Bio Energy Facility. (Testimony of W. Dell'Orfano, Day 3, pp. 142-46).
 - I. Holding above-ground storage tank permits/registrations. (Testimony of W. Dell'Orfano, Day 3, p. 149).
 - J. Purchasing capital equipment for solid waste processing systems and structures. (Testimony of W. Dell'Orfano, Day 3, pp. 157-66).
40. The agents and principals of the various entities involved with the Bio Energy Facility (including but not limited to Bio Energy Corporation, Bio Energy LLC, Regenesys Corporation, and XGenesys Development Corporation) have not always maintain clear lines of delineation between their activities and undertakings, and there has been a general disregard of the corporate form in relation to their involvement with the Bio Energy Facility, particularly in relation to the actions of Harry Smith, who is the Vice President of Operations for many of them simultaneously, and claims that the various uses of the various names on different occasions has often times been in error. (Testimony of H. Smith, Day 2, pp. 46-50, 77-79, 86-89, 109-114; Day 2, pp. 171-72); (Testimony of W. Dell'Orfano, Day 3, p. 137).

41. Despite the depth and breadth of Bio Energy LLC's *de facto* involvement in the Bio Energy Facility since its inception through today, William Dell'Orfano claims that Regenesis Corporation has complete control over the Bio Energy Facility pursuant to the December 15, 2002 lease, and that his plan is to transfer all of the permits related to the Facility to Regenesis Corporation, also pursuant to the December 15, 2002 lease, once it is allegedly possible to do so. Regenesis Corporation will allegedly become the operator of the solid waste facility once the lease reaches its "effective date," which has not occurred. Mr. Dell'Orfano does not, however, understand the details of why the permits allegedly cannot be transferred at this time, citing obliquely permit shield concerns without any explanation or understanding. (Testimony of H. Smith, Day 1, pp. 250-51; Day 2, pp. 102-08, 144, 146, 179-82, 186-87); (Testimony of W. Dell'Orfano, Day 3, pp. 22-26, 48-52, 97-98, 153-57, 197-98).
42. While William Dell'Orfano claims that operational control of the Bio Energy Facility has been turned over the Regenesis Corporation, this is inconsistent even with responses to information requests in this very license action, wherein Regenesis Corporation has presented sworn testimony that operational control of the Facility "will" be turned over to Regenesis Corporation in the future. This is explained, again, as an error. (Testimony of W. Dell'Orfano, Day 3, pp. 150-52).
43. In response to the apparent depth and breadth of Bio Energy LLC's *de facto* involvement in the Bio Energy Facility since its inception through today, William Dell'Orfano and Harry Smith claim that all actions undertaken by Bio Energy LLC are done so as Regenesis Corporation's "agent." (Testimony of H. Smith, Day 2, pp. 156, 184); (Testimony of W. Dell'Orfano, Day 3, p. 165).
44. William Dell'Orfano and Harry Smith do not recall when they, or any other agent of Bio Energy LLC or Regenesis Corporation, first informed NHDES that Bio Energy LLC ostensibly plans to transfer the Title V air permit to Regenesis Corporation, but that was likely not conveyed to NHDES until recently, after this license action was initiated. (Testimony of H. Smith, Day 2, pp. 174-75); (Testimony of W. Dell'Orfano, Day 3, p. 26).
45. Internal corporate governance documentation, between and among William Dell'Orfano and Anthony Dinapoli, including minutes of corporate meetings attested to by William Dell'Orfano, indicate that although the two principals of Bio Energy LLC (and other entities associated with the Bio Energy Facility) had a disagreement regarding Anthony Dinapoli's involvement with the Bio Energy Facility going forward, on or around July, 2003, this dispute was related to Mr.

Dinapoli's desire not be involved in the Facility any longer, and his refusal to contribute the level of financial support for the Facility that Mr. Dell'Orfano desired and requested from him. Mr. Dinapoli expressed his desire that his ownership in the Facility be bought out by Mr. Dell'Orfano or by some other means. The source of the principals' disagreement related to the valuation of Mr. Dinapoli's interest in the Facility, and there is no indication in any record that his prior felony conviction, or any other concerns or considerations, played any roll in this dispute. Mr. Dell'Orfano refused to continue any negotiations with Mr. Dinapoli, withdrawing his offer to buy Mr. Dinapoli's interest, and thereafter continuing discussions regarding Mr. Dinapoli's continued involvement and investment in the Bio Energy Facility. Mr. Dinapoli was in favor of letting the Bio Energy Facility's permits lapse, although Mr. Dell'Orfano desired to speed up work at the site in response to concerns among local residents. (Testimony of H. Smith, Day 2, p. 69); (Testimony of W. Dell'Orfano, Day 3, pp. 88-94).

46. Of all the entities owned by William Dell'Orfano and Anthony Dinapoli together, the only one in which Anthony Dinapoli is not an officer, director, shareholder or member, is Regenesi Corporation, which only holds the solid waste permit, the only permit requiring a background check and specific certifications regarding, *inter alia*, criminal history. (Testimony of H. Smith, Day 2, pp. 139-40); (Testimony of W. Dell'Orfano, Day 3, pp. 23, 86-87).

D. CFNH'S REQUESTS (Numbered as in requesting document)

CFNH's Proposed Findings of Fact and Conclusions of Law-May 20, 2005

1. Since 1983, Bio Energy LLC (including its predecessor, Bio Energy Corp. a/k/a Bio Energy Corporation) has operated a wood incinerator facility in West Hopkinton (the "Facility"). The Facility has burned wood chips and produced electricity and steam.

- Transcript I, p. 235, ll. 5-10 (Smith).
- Transcript II, p. 217 (Dell'Orfano).
- Intervenor Ex. 20 (Certificate and Articles of Amendment of Bio Energy Corp., changing name to Bio-Energy Corporation).

2. On October 9, 2001, Bio Energy Corporation submitted *to the New Hampshire Department of Environmental Services (“DES”)* an application for a solid waste facility permit for a facility located at 2003 Maple Street in West Hopkinton, N.H. (“Bio Energy Facility”). (Amended Notice, Section III, ¶10 – **modified language in italics**).

- Admitted, as to unmodified language (see Respondent’s Answer to Amended Notice, Page 4, Section III, ¶10).
- Intervenor’s Ex. 7 (2001 Permit Application).

3. The application sought a permit to authorize use of up to 50% processed wood chips, including chips derived from construction and demolition debris treated with paints and other materials that emit lead, mercury, and other harmful or toxic chemicals when burned.

- Intervenor’s Ex. 7 (2001 Permit Application).
- Transcript II, p. 36 (Smith: “our permit application in 2001 enabled us to burn clean wood from construction and demolition activities, and also painted wood from construction and demolition activities).
- Transcript III, p. 230, ll. 9-22 (Giunta).

4. At the time of the 2001 solid waste permit application, Bio Energy Corporation owned and operated the Bio Energy Facility. Anthony DiNapoli and William Dell’Orfano were each 50% shareholders of Bio Energy Corporation. In addition, Mr. Dell’Orfano acted as President, Secretary and Director and Mr. DiNapoli acted as Treasurer and Director of Bio Energy Corporation. Harry Smith was the Vice President of Operations.

- Intervenor’s Ex. 19 (Certificate of Amendment and Articles of Amendment for Bio Energy Corporation).
- Intervenor’s Ex. 7, at INT0063-65.
- Intervenor’s Ex. 139, at INT1559-62.

- Transcript II, p. 50, ll. 19-22 (Smith).
 - Transcript III, p. 68, ll. 15-23 (Dell'Orfano).
5. On October 16, 2001, Anthony DiNapoli, also known as Antonio DiNapoli, submitted a Personal History Disclosure Form to the AGO in connection with Bio Energy Corporation's application. **(Amended Notice, Section III, ¶11).**
- Admitted (see Respondent's Answer to Amended Notice, Page 4, Section III, ¶11).
 - Intervenors' Ex. 9.
6. Mr. DiNapoli's responses on the form included a sworn statement that he had no criminal convictions (motor vehicle offenses excepted). **(Amended Notice, Section III, ¶12).**
- Admitted (see Respondent's Answer to Amended Notice, Page 4, Section III, ¶12).
7. On October 18, 2001, Mr. DiNapoli was indicted in Hillsborough County Superior Court for witness tampering, a felony. **(Amended Notice, Section III, ¶13).**
- Admitted*¹ (see Respondent's Answer to Amended Notice, Page 4, Section III, ¶13).
8. Also October 18, 2001, Bio Energy Corporation's counsel filed a letter with the NH Department of Justice advising that Messrs. Dell'Orfano, DiNapoli and Smith were "the 'key' owners and/or supervisors of Bio Energy."
- Intervenors' Ex. 11.
9. On November 5, 2001, the AGO performed a criminal record check on Mr. DiNapoli. The search revealed nothing inconsistent with Mr. DiNapoli's response on the form. There was no indication of the recently filed charges. **(Amended Notice, Section III, ¶14).**

¹ The "*" denotes that Respondent provide a further response to the Amended Notice allegation.

- Transcript I, p. 62, ll. 3-11 (Nickerson).

10. On or about January 18, 2002, Messrs. DiNapoli and Dell'Orfano formed a new entity – Bio Energy LLC, a New Hampshire Limited Liability Company, with an address at 749 East Industrial Park Drive, Manchester, NH. Mr. DiNapoli and Mr. Dell'Orfano were each 50% members/owners of Bio Energy LLC and Harry Smith was designated the Vice President of Operations (as they were with Bio Energy Corp.).

- Intervenor Exs. 18 and 20 (Registration with NH Corporation Division and Certificate of Existence).
- Intervenor Ex. 23 (Redacted Operating Agreement, with Schedule A identifying DiNapoli and Dell'Orfano as Members).
- Intervenor Ex. 89, at INT1056 (updated Exhibit No. 3 for Regenesys' Business Disclosure Form, showing affiliated entities).
- Transcript II, p. 50, l. 19 – p. 51, l. 12 (Smith).
- Transcript III, p. 73, ll. 13-20 (Dell'Orfano).

11. The purpose of the LLC was to “purchase, develop, own, improve, lease, maintain and operate power generating assets of every kind....”

- Intervenor Ex. 21 (Operating Agreement, Bio Energy LLC).

12. On January 28, 2002, while the solid waste facility application was pending, the Directors of Bio Energy unanimously approved a plan of liquidation for the company, which stated an effective dissolution date of August 31, 2002. **(Amended Notice, Section III, ¶15).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 5, Section III, ¶15).
- Intervenor Ex. 24 (Written Consents of Shareholders and Directors and Plan of Liquidation: “Bio-Energy Corporation shall dissolve and liquidate, effective August 31, 2002).

13. In response to an inquiry from the AGO in early March of 2002, prompted by a March 7, 2002 newspaper article indicating that the Bio Energy facility was closing, Bio Energy confirmed that the article was accurate but stated that the company wished to go forward with the solid waste permit application process and intended eventually to transfer the solid waste permit to another company. (Amended Notice, Section III, ¶16).

➤ Admitted (see Respondent's Answer to Amended Notice, Page 5, Section III, ¶16).

14. On March 20, 2002, the AGO conveyed the results of its Bio Energy background investigation to DES. (Amended Notice, Section III, ¶17).

➤ Admitted* (see Respondent's Answer to Amended Notice, Page 5, Section III, ¶17).

15. On March 25, 2002, Mr. DiNapoli was convicted in Hillsborough County Superior Court of witness tampering, a felony. The conviction was affirmed by the New Hampshire Supreme Court in State v. DiNapoli, 149 N.H. 514 (2003). (Amended Notice, Section III, ¶18).

➤ Admitted* (see Respondent's Answer to Amended Notice, Page 6, Section III, ¶18).

16. At the time of the conviction, Mr. DiNapoli was an officer, director and shareholder of Bio Energy Corporation.

➤ Intervenor's Ex. 40 (Consent Resolutions of the Shareholders and Directors of Bio-Energy Corporation).
➤ Transcript III, p. 68, ll. 15-23, p. 69, ll. 1-22 (Dell'Orfano).

17. On April 10, 2002, Bio Energy Corporation filed additional information with DES in support of its pending solid waste facility application, including information relating to site layout and traffic, easement rights obtained by Bio Energy Corporation

as owner of the site, revised operating plan provisions, a proposed facility closure plan, and other items requested by DES. However, Bio Energy did not disclose Mr. DiNapoli's conviction or attach any Compliance Statement warranting a permit notwithstanding that conviction.

- Intervenors' Ex. 32 (April 10, 2002 correspondence, stamped received by DES on April 12, 2002).

➤

18. On May 28, 2002, DES issued Solid Waste Permit No. DES-SW-SP-002 ("the Permit") to Bio Energy, without knowledge of Mr. DiNapoli's felony conviction.

(Amended Notice, Section III, ¶19).

- Admitted* (see Respondent's Answer to Amended Notice, Page 6, Section III, ¶19).
- Intervenors' Ex. 37 (2002 Permit).

19. The Permit (also referenced herein as the "2002 Permit") referred to Bio Energy Corp.'s application received on October 9, 2001 and "Standard Permit Application - response to request for additional information, received April 12, 2002." The latter post-dated DiNapoli's felony conviction and was the effective date of the application, that is, the "complete application" contemplated by the regulations.

- Intervenors' Ex. 37, at INT0605 (2002 Permit, Section II).

20. The Permit regulated both the construction of the incinerator Facility and the post-construction operation of the incinerator Facility.

- Intervenors' Ex. 37, at INT0607 (2002 Permit, ¶ 6).

21. Dell'Orfano and Smith learned of DiNapoli's conviction by at least mid-June, 2002.

- Intervenors' Ex. 1, Respondent's Answer to Amended Notice, Page 7, Section III, ¶21).
- Transcript II, pp. 234-236 (Dell'Orfano).

22. On June 12, 2002, Bio Energy executed a Purchase and Sale Agreement conveying the Bio Energy Facility, including the buildings, the underlying property, most of the facility's equipment and machinery, and "to the extent transferable, all permits, licenses, authorizations and approvals issued or granted to Seller by any governmental agency . . ." to a new entity, Bio Energy, LLC. The Permit was specifically listed as one of the transferred assets. The agreement was executed on behalf of both buyer and seller by William Dell'Orfano. Mr. Dell'Orfano was listed as President of Bio Energy Corporation, and Manager of Bio Energy, LLC. (Amended Notice, Section III, ¶20).

- Admitted* (see Respondent's Answer to Amended Notice, Page 6, Section III, ¶20).
- Intervenors' Ex. 41 (Purchase and Sale Agreement).

23. The Consent Resolutions of the Shareholders and Directors of Bio Energy Corporation, relating to the sale of the Facility to Bio Energy LLC, specified as follows:

That the Corporation be and hereby is authorized, empowered and directed to sell, transfer and convey to Bio Energy LLC, a New Hampshire limited liability company which is also wholly owned by the shareholders of the Corporation, all of the real and personal property assets (whether tangible or intangible) of the Corporation related to or used or useful in the operation of its power plant (with the exception of the CBI crusher)...

- Intervenors Ex. 40.

24. Also on June 12, 2002, Bio Energy Corp. and Bio Energy LLC effected the transfer of the Facility and Permit to Bio Energy LLC by executing a "Bill of Sale, Assignment and Assumption Agreement," evidencing that Bio Energy Corp. "DOES HEREBY IRREVOCABLY SELL, ASSIGN, CONVEY, LICENSE AND OTHERWISE TRANSFER AND DELIVER to [Bio Energy LLC] all of Seller's right, title, benefit and interest in and to the Personal Property, the Intangible Property and the

Permits, as such terms are defined in the Purchase Agreement and specifically including, but not limited to, those items of said Property listed on the attached Exhibit A, TO HAVE AND HOLD the same unto Buyer and the successors, assigns and legal representatives of Buyer forever.” Exhibit A thereto listed the transferred assets, including the 2002 Solid Waste Permit. Bio Energy LLC also agreed in the Bill of Sale “to perform and be responsible for, any and all obligations, duties and liabilities related to the said Property....”

➤ Intervenors’ Ex. 42 (Bill of Sale).

25. The principals of Bio Energy Corporation and Bio Energy LLC, Messrs. DiNapoli and Dell’Orfano, transferred Bio Energy Corporation’s assets to Bio Energy LLC so that Bio Energy could be dissolved – which enable them to reap certain tax benefits from the sale of its rate order contract with Public Service of New Hampshire; the intent was for Bio Energy LLC to continue the operations of Bio Energy Corporation with the same owners, officers, directors, and employees – the only change being one of corporate form.

- Transcript II, p. 38, line 16 to p. 39, line 9 (Smith: Q: So there weren’t any operational or ownership changes contemplated through this sale? A. No. Q. Other than the name of the entity going from Bio Energy Corp. to Bio Energy, LLC? A. Yes. **In order to – in order to realize the tax situation, it was told to me that Bio Energy Corp. had to be dissolved, and a new entity would be brought into existence, which was going to be Bio Energy, LLC. And they were going to continue the operations that Bio Energy Corp. had previously operated.”**)
- Transcript II, p. 126, ll. 2-13 (Smith: “Q. So that at the point of that transfer in June of 2002, there was no contemplation that the corporation was going to continue in any capacity whatsoever to operate the Bio Energy facility, correct? A. **Right. It was going to be dissolved.** Q. And the whole concept was that Mr. DiNapoli and Mr. Dell’Orfano would continue in the business as equal owners and operators of that facility, correct? A. **That was the plan that was told to me, yes.”**)
- Transcript III, p. 39, l. 19 – p. 40, l. 23 (Dell’Orfano).

- Transcript III, p. 78, l. 14 – p. 79, l. 1 (Dell’Orfano: “...it was your intention that the corporation was going to put everything to the LLC, and that you ... and Mr. DiNapoli would be continuing on as the LLC? A. **That’s correct.** Q. As 50 percent owners? A. **That’s correct.**).

26. On June 14, 2002, Messrs. Dell’Orfano and DiNapoli provided written notice to Bio Energy LLC (i.e., themselves) confirming that “as part of a total liquidation of Bio Energy Corporation the current receivable being held from the sale of the real and personal property assets of Bio Energy Corporation ... has been distributed to Mr. Anthony DiNapoli and William Dell’Orfano.” That notice further confirmed that “Anthony DiNapoli and William Dell’Orfano will convert the above referenced receivables into a capital contribution to Bio Energy LLC.”

- Intervenors’ Ex. 45.

27. At no time before or since this transaction, transferring the Facility to Bio Energy LLC, has DES granted a Permit Modification – or even been asked to grant a Permit Modification – authorizing the transfer of the Facility to Bio Energy LLC as required by Env-Wm 315.02(f) and 315.03 prior to any “change in the: (1) Operational control of a facility; or (2) Ownership of the facility....” See, for example:

- Transcript I, p. 238, ll. 12-23 and p. 239, ll. 1-20 and p. 246, ll. 4-12 (Smith).

- Transcript II, p. 83, ll. 7-22 (Smith).

28. After the June 2002 sale of the Facility, and consistent with Bio Energy LLC assuming the responsibility for Facility operations, Harry Smith, in his role as Vice President of Operations for Bio Energy LLC, commenced efforts to notify governmental authorities and seek permit amendments/transfers to reflect the transfer of the Facility to Bio Energy LLC, which included permit amendments and transfers

from Bio Energy Corporation to Bio Energy LLC of the Facility's Title V Operating Permit (air), NPDES permit (water discharges), software licenses, certified waste derived product approval, hazardous waste identification number, and above ground storage tank registrations.

- Transcript II, p. 52, line 1 to p. 54, line 17 (Smith: Testifying about his role in these notices and transfers as VP Operations of Bio Energy LLC).
- Intervenor Exs. 47 (request re Title V Operating Permit) and 49 (Administrative Amendment to Title V Operating Permit, certifying that the permit is granted to Bio Energy LLC and identifying Mr. Dell'Orfano, President of Bio Energy LLC, as the "Responsible Official" and Harry Smith, "Plant Manager" of Bio Energy LLC, as the "Technical Contact").
- Intervenor Ex. 48 (NPDES permit).
- Intervenor Ex. 54 (software licenses);
- Intervenor Ex. 61 (hazardous waste identification number).
- Intervenor Ex. 62 (certified waste-derived product).
- Intervenor Ex. 63 (aboveground storage tank registrations).

29. On or about July 1, 2002, Bio Energy submitted a request to the Air Resources Division ("ARD") of DES to transfer the Title V air permit from Bio Energy Corporation to Bio Energy, LLC. Under the applicable administrative rules, a change in ownership for purposes of a Title V permit is considered an Administrative Permit Amendment, and does not require a background investigation. (**Amended Notice, Section III, ¶23**).

- Admitted (see Respondent's Answer to Amended Notice, Page 7, Section III, ¶23).

30. None of the programs notified of the change required a background investigation in conjunction with a change of ownership. In correspondence associated with the name change, Bio Energy indicated that "[e]ffective September 1, 2002 all of the assets owned by Bio Energy Corporation were transferred to Bio Energy LLC." However, Bio Energy did not apply to the DES solid waste program for permission to

transfer the solid waste Permit to Bio Energy, LLC. (Amended Notice, Section III, ¶25, Excerpt Only).

- Admitted* (see Respondent's Answer to Amended Notice, Page 8, Section III, ¶25).

31. For any permits that could not be effectively transferred to Bio Energy LLC, Bio Energy's officials initially intended that those permits would become void and that Bio Energy LLC would apply for an original permit in its own name; it was never intended that the failure to obtain approval to transfer approval would in any way affect the sale of the Facility to Bio Energy LLC.

- Transcript II, p. 40, line 17 to p. 42, line 7 (Smith: "Q. Do you have any understanding of what the consequences would be if any of these permits could not be transferred to the LLC? A. **Yes. Basically, some of the permits were not transferable, and we would have to start over again and apply for the permits from the beginning rather than transfer them.**").

32. Bio Energy had originally applied for a solid waste permit in 2001 because it proposed to burn waste wood material classified as solid waste, which made the operation an incineration facility under the solid waste rules. The company did not propose to process wood material into wood fuel chips at the Bio Energy facility, and no permit was issued for that activity. (Amended Notice, Section III, ¶26).

- Admitted* (see Respondent's Answer to Amended Notice, Page 8, Section III, ¶26).

33. According to the facility's Title V air permit issued by the ARD, the "significant activities" at the facility consist of operation of a wood-fired boiler and circulation water cooling tower. (Amended Notice, Section III, ¶27).

- Admitted (see Respondent's Answer to Amended Notice, Page 8, Section III, ¶27).

34. As a practical matter, the activity allowed under the solid waste permit was the same as the activity allowed under the air permit: burning fuel generated from waste wood material to create electricity. (Amended Notice, Section III, ¶28).

- Transcript I, p. 175 (Guilfoy: “Q: So given all of that, would it be fair to say that there is substantial overlap between the state solid waste permitting program and the state air permitting program as it regards operation of incinerators? A. Yes.)

35. On or about July 5, 2002, Bio Energy Corp. served a notice of filing of a Type IV permit modification application relating to the transfer of the Facility and 2002 Permit from Bio Energy Corp. to Bio Energy LLC. This Notice reflected Bio Energy’s initial intent to request that the Department transfer the solid waste permit – through a “Type IV Modification for Standard Permit” – from Bio Energy Corporation to Bio Energy LLC. Indeed, the transfer had already occurred – unlawfully, because it proceeded without the Department’s prior approval.

- Intervenors’ Ex. 50.
- Transcript I, p. 238, ll. 12-23 and p. 239, ll. 1-20 and p. 246, ll. 4-12 (Smith).
- Transcript II, p. 83, ll. 7-22 (Smith).

36. After circulating this Notice, Bio Energy decided not to file the actual transfer application. This decision was based on the realization that it would have to disclose DiNapoli’s conviction in that application and that such disclosure would create problems with the transfer of the waste permit from Bio Energy Corp. to Bio Energy LLC.

- Regensis’ Response to the State’s First Set of Request to Dell’Orfano, p. 2, ¶5.

- Regensis' Response to the State's First Set of Request to Smith, p. 2, ¶5.
- Transcript I, p. 243, ll. 8-22 (Smith).
- Transcript II, at pp. 63-65 (Smith: **"...when we were filling out the – when it became clear that it was an issue, a problem, was when we were preparing the transfer applicaton"**).

37. Rather than seeking DES' approval of the transfer from Bio Energy Corp. to Bio Energy LLC as required, or even discussing the situation with DES, Dell'Orfano and Smith instead devised a corporate shell game and otherwise elaborate scheme aimed at circumventing the disclosure requirements. The scheme included (1) not filing the Type IV Permit Modification application required in connection with the sale of the Facility to Bio Energy LLC, (2) removing DiNapoli from Bio Energy Corp. (which had already sold all of its assets to Bio Energy LLC and was being dissolved) – without filing a Type IB Permit Modification application required for such changes in a permittee's organizational structure, (3) executing a lease between Bio Energy, LLC and yet another company owned by Dell'Orfano, Regensis Corporation, which purported to provide Regensis with some limited, future operational control over the Facility, and (4) by then submitting a Type IV Permit Modification application seeking to transfer the Permit from the defunct Bio Energy Corp. to Regensis and, in that application and related communications, mischaracterizing the roles of the various affiliated entities and individuals and otherwise misrepresenting and/or omitting material information to avoid disclosure or scrutiny of DiNapoli's conviction. See, for example, the following:

- Transcript II, at pp. 75-81 (Smith: **"...Mr. Dell'Orfano explained to me, that by Mr. DiNapoli resigning, the LLC entering into a lease with Regensis Corp., that would take him totally out of the project, and he would have no involvement. Q. That would put him**

into a position where the compliance certification and the transfer application would not have to pertain to him and would not have to disclose his conviction? **A. That would put him in the position of a property owner only, and he would have no involvement in the facility, and, therefore, Mr. Dell'Orfano could truthfully certify that there were no current members, officers, directors convicted of a felony for the previous permittee and the proposed permittee."**)

- Transcript II, at p. 147, l. 20 – p. 148, l. 1 (Smith: "Q. All of these companies, PetroFiber and their land, and this whole process, the only one in which you got DiNapoli out of it was the one where you had to make the disclosure to the DES, right? **A. Yes."**).
- Transcript II, p. 150, l. 17 – p. 151, l. 2 (Smith: "Q. In order to avoid the problems that resulted from disclosing Mr. DiNapoli's criminal conviction on the solid waste transfer permit, Mr. Dell'Orfano involved yet another company he owned, leasing the assets to it, and then listing it as the proposed operator, true or not? **A. Yes. Q. That is true, right? A. Yes."**)
- Transcript II, p. 153, l. 16 – p. 154, l. 3 (Smith).
- Transcript III, p. 94, l. 8 – p. 95, l. 9 (Dell'Orfano: Q. In order to avoid the problems that would result from disclosing Mr. DiNapoli's criminal conviction on the solid waste transfer permit, you involved yet another company you owned, right? **A. Yes. Q. And that was Regenesi? A. Yes."**)
- Transcript III, p. 171-173 (Dell'Orfano testimony relating to DiNapoli's resignation from Bio Energy Corporation).
- Intervenor's Ex. 69, at INT0750-753; State Ex. 14 (Notice of Filing sent to public in December, 2002, falsely identifying "Bio Energy Corporation" as the "Existing Facility Identification," as the "Existing Name and Mailing Address of the Applicant, Facility Owner and Facility Operator," and as the "Existing Name and Mailing Address of Property Owner," and also falsely stating that "Bio Energy Corporation owns and operates [the Facility]," and omitting any reference at all to Bio Energy LLC).
- Intervenor's Ex. 68, at INT0716-722 (transmittal letter for Notice of Filing, on Bio Energy Corporation letterhead and falsely stating that the Application related to "Bio Energy Corporation's power generation facility."
- Intervenor's Ex. 68, December, 2002 Application, falsely or misleadingly:
 - identified "Bio Energy Corporation" as the "Facility name" and "existing permittee" (Intervenor's Ex. 68, at INT0731-732);
 - identified Regenesi Corporation as the "proposed new permittee" and "facility operator following transfer of the permit" – although in fact Bio Energy LLC was and continued to be the owner and operator of the Facility for

- many months after the requested permit transfer modification was issued;
 - failed to note in Section IV(1) of the Application that Bio Energy LLC already owned the property (Intervenors' Ex. 68, at INT0733), although identifying as the post-transfer property owner; and
 - otherwise created the false impression that Bio Energy Corporation owned and operated the Facility at the time the application was filed, that Regenesys would be the sole operator of the Facility after issuance of the requested Permit Modification, and that Bio Energy LLC was nothing more than the future owner of the underlying property with no current or future role in Facility operations or responsibility for compliance with the Solid Waste Permit.
- Intervenors' Ex. 88 (Dell'Orfano response to request for clarification from AG Office regarding the relationship of Xgenesys, Regenesys and Bio Energy LLC. Response acknowledged the significant officer/employee overlap between Xgenesys and Regenesys, reiterated falsely or misleadingly that the "key employees that will be involved in the project" would be himself, Smith, Sheehy and O'Neil, and did not mention Bio Energy LLC at all).
- Transcript I, p. 118-119 (Nickerson: testifying that although DiNapoli's role as a member of Bio Energy LLC was disclosed, the LLC's role in the operation of the Facility operations was not disclosed and it was not characterized as an applicant or proposed permittee).
- Transcript II, at 207-208 (Dykstra: testifying that when he asked Mr. Smith directly about Mr. DiNapoli's involvement with the Facility in connection with the December, 2002 Transfer Application, Mr. Smith stated (falsely) that Mr. DiNapoli was in the process of divesting himself from the Facility and mentioned nothing about the company's concerns with respect to Mr. DiNapoli.)
- See other Proposed Findings of Fact herein.

38. Mr. Dell'Orfano purportedly asked Mr. DiNapoli to resign from Bio Energy Corporation and Bio Energy LLC due to concerns about how his felony conviction might impact the company's solid waste facility Permit and the transfer of that Permit to the LLC. Mr. DiNapoli agreed to resign from Bio Energy Corporation, which had already sold the Facility to the LLC and was in the process of being dissolved. He also agreed to sell his interest in the LLC, but Mr. Dell'Orfano was not willing to pay him the asking price.

- Transcript III, p. 88, ll. 2-7 (Dell’Orfano: “Isn’t the fact, Mr. Dell’Orfano, that Mr. DiNapoli wanted to sell you his interest, and you refused to pay his price? A. **It was – it was a very, very, very, very outrageous situation. That’s correct, I refused to pay what he was looking for.”)**)

39. Mr. DiNapoli did not resign from Bio Energy, LLC. From at least August 30, 2002 to the present, Mr. DiNapoli has been a member and a creditor of Bio Energy, LLC. From July 29, 2003 to the present, Mr. DiNapoli has also been a managing member of Bio Energy, LLC. **(Amended Notice, Section III, ¶22).**

- Admitted* (see Respondent’s Answer to Amended Notice, Page 7, Section III, ¶22).
- Intervenor’s Ex. 22 (Amendment, Bio Energy LLC, dated July 29, 2003 with an effective date of the appointment stated as January 21, 2002);
- Transcript III, p. 105, l. 18 – p. 106, l. 18 (Dell’Orfano, confirming retroactive effective date of DiNapoli’s appointment to Managing Member as January, 2002).

40. On August 29, 2002, Dell’Orfano obtained a name change for Terramex Corporation to Regenesys Corporation and DiNapoli resigned from and turned in his shares of Bio Energy Corp.

- Intervenor’s Ex. 1, Regenesys’ Response to the State’s First Set of Request to Dell’Orfano, p. 2, ¶4.
- Transcript III, p. 94, l. 8 – p. 95, l. 8 (Dell’Orfano).

41. On August 30, 2002, Bio Energy Corporation filed Articles of Dissolution with the New Hampshire Secretary of State. **(Amended Notice, Section III, ¶24).**

- Admitted* (see Respondent’s Answer to Amended Notice, Page 7, Section III, ¶24).
- Intervenor’s Ex. 56 (Consent Resolutions of the Shareholders and Directors of Bio-Energy Corporation, resolving, inter alia, “That the Corporation be dissolved and wound up as of August 30, 2002....”).

42. As of August 30, 2002, Bio Energy LLC was the sole owner and operator of the Facility. It has remained the owner and operator of the Facility well beyond the date the DES issued the Type IV Modification to the Permit in 2003 – as Bio Energy LLC

has represented to numerous governmental officials on contexts other than the solid waste context.

- See Proposed Finding 55 and supporting citations.
- Transcript II, p. 51, line 8 - p. 52, line 16 (Smith: testifying that his activities at the Facility in August, 2002 were in his role as Vice President of Operations for Bio Energy LLC).

43. On December 11, 2002, Bio Energy Corporation, Bio Energy, LLC and Regenesi Corporation filed with DES an application to transfer the Permit to Regenesi ("the Transfer Application"). All three corporations gave the same mailing address of 1994 Maple Street, West Hopkinton, NH 03229, and the check that accompanied the application was from a Bio Energy, LLC account. Corporate officials represented to DES and the AGO that the four individuals who would be required to complete Personal History Disclosure Forms had already completed the forms in connection with the Bio Energy background investigation. With the exception of Mr. DiNapoli, the officers and directors of Regenesi Corporation were the same as the officers and directors of Bio Energy. **(Amended Notice, Section III, ¶29).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 9, Section III, ¶29).

44. On the Transfer Application, William Dell'Orfano signed, on behalf of both *Bio Energy Corp. and Regenesi*, the *purported* existing permittee and the *purported* proposed permittee, the certification required under Env-Wm 303.14. Specifically, this included a certification that none of Bio Energy's officers or directors had been convicted of a felony during the five years before the date of the application. None of the statements on either certification were circled as untrue, and no Compliance Reports or explanations were attached. **(Amended Notice, Section III, ¶30 – modified language in italics).**

- Admitted, as to unmodified language (see Respondent's Answer to Amended Notice, Page 10, Section III, ¶30).

45. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy Corp., Bio Energy LLC, or Regenesi inform the DES solid waste program that the Facility had already been transferred to Bio Energy LLC and that Bio Energy LLC was the operator of the Facility and had been since June, 2002.

- Intervenor's Ex. 68 (Transfer Application).

46. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy Corp., *Bio Energy LLC*, or *Regenesi* inform the DES solid waste program that Bio Energy Corp. had been dissolved. (Amended Notice, Section III, ¶31 – modified language in italics).

- Intervenor's Ex. 68 (Transfer Application).
- Transcript I, p. 154, l. 17 to p. 155, l. 11 (Guilfoy: testifying that disclosure of Bio Energy Corp.'s dissolution would have raised the question of "do we have a valid permit if there's no permittee.")

47. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesi inform the DES solid waste program of the purported transfer of the Permit to Bio Energy, LLC. (Amended Notice, Section III, ¶32).

- Admitted* (see Respondent's Answer to Amended Notice, Page 12, Section III, ¶32).

48. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesi inform the DES solid waste program that other environmental permits associated with the facility were held not by Regenesi but by Bio Energy, LLC. (Amended Notice, Section III, ¶33).

- Admitted* (see Respondent's Answer to Amended Notice, Page 12, Section III, ¶33).

49. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesis inform the DES solid waste program that Mr. DiNapoli had been convicted of a felony, that he had resigned from any company, or that there were any concerns about his continued involvement with the facility.

(Amended Notice, Section III, ¶34).

- Admitted* (see Respondent's Answer to Amended Notice, Page 13, Section III, ¶34).
- Transcript I, p. 232-233 (Smith: "Q: So you don't remember ever going to the agency with questions about how to fill out a form? A: **Oh, yeah, all the time.** Q: And when you did have those questions, did the agency help clarify those questions? A: **Yes.** Q: But you did not bring your concern about Mr. DiNapoli to the agency's attention? A: **That's correct.**")

50. During the Transfer Application process, Regenesis corporate officials led the DES solid waste program to believe that Mr. DiNapoli was in the process of divesting himself from involvement with the Bio Energy facility. They did not inform the program when Mr. DiNapoli later became a managing member of Bio Energy, LLC.

(Amended Notice, Section III, ¶35).

- Admitted* (see Respondent's Answer to Amended Notice, Page 14, Section III, ¶35).
- Transcript II, at p. 71, ll. 3-7 (Smith: "I assumed that Mr. Dell'Orfano did not – was not successful in buying out Mr. DiNapoli, because we're still dealing with him. I mean, he's – he's – to my knowledge, he is still a member of Bio Energy, LLC").
- Transcript II, at p. 147, l. 20 – p. 148, l. 1 (Smith: "Q. All of these companies, PetroFiber and their land, and this whole process, the only one in which you got DiNapoli out of it was the one where you had to make the disclosure to the DES, right? A: **Yes.**").

51. On the Transfer Application, Mr. Dell'Orfano signed the following statement on behalf of both the *purported* existing permittee (Bio Energy Corporation) and the

proposed new permittee (Regenesis): "To the best of my knowledge and belief, the information and material submitted herewith is correct and complete. I understand that any approval granted by DES based on false and/or incomplete information shall be subject to revocation or suspension, and that administrative, civil or criminal penalties may also apply." (Amended Notice, Section III, ¶36 – **modified language in italics**).

- Admitted, as to unmodified version (see Respondent's Answer to Amended Notice, Page 14, Section III, ¶36).

52. In a lease executed on December 6, 2002, Bio Energy LLC purported to lease to Regenesis Corporation the land, buildings and equipment at the Facility. Under the lease agreement, the base rent to be paid to the LLC was directly related to Regenesis= net cash flow as defined therein. Accordingly, Bio Energy LLC and its owners, including DiNapoli, stood to profit from the Facility=s operations and in direct relation to Regenesis' profits.

- Intervenors' Ex. 67 (Lease; see Paragraph 3, "Rent").
- Transcript II, pp. 88-89 (Smith: "Q. So the amount that Bio Energy, LLC makes from this lease is dependent upon what Regenesis makes as a result of its operations, correct? A. Yes. ... Q. So the LLC's base rent is tied to the profits of Regenesis from these operations, correct? A. **It's tied to the profits of the facility, how much the facility takes in in gross revenues.** Q. And Mr. DiNapoli's own revenue from Bio Energy, LLC, therefore, is dependent upon the profits of Regenesis' operations at this facility? A. **Correct.**").

53. The lease term is 20 years. However, according to Section 2 of the Closure Plans for the Facility, filed with the DES by Bio Energy Corp. (dated October 5, 2001) and later by Regenesis (dated February 12, 2003), AThe anticipated remaining site life of the facility is 30 years,@ and may be extended beyond 30 years by upgrading and maintaining the facility. In addition, under section 3.1.2 of the Lease, Bio Energy LLC

retains responsibility for all capital improvements, facility improvements and environmental law changes requiring facility modifications. Accordingly, Bio Energy LLC retains responsibility for complying with numerous environmental laws governing the Facility during the lease term and all operational responsibility after termination of the Lease, including post-closure obligations.

- Intervenors' Ex. 67 (Lease).
- Intervenors' Ex. 92 (Closure Plans).
- Transcript II, p. 87 (Smith: testifying that life of Facility may be 30 years).
- Transcript II, p. 89, l. 22 – p. 90, l. 16 (Smith: **"It's my understanding that the function of the lessor [Bio Energy LLC] is to pay for the capital improvements needed at the facility. That's my understanding of what the role of the lessor is. Q. Even after Regenesis takes control, if it ever does, of the operations of the facility? A. If there are new capital improvements required because of an environmental law change, then the lessor would have to pay for those, yes."**)

54. Although the lease was executed in December, 2002, Regenesis was not licensed to conduct business in New Hampshire until January 21, 2003.

- Transcript II, p. 154, ll. 18-21 (Smith).

55. The lease to Regenesis notwithstanding, Bio Energy LLC's control over the operations of the Facility (including but not limited to maintenance, repair and construction activities) continued well beyond the date the DES issued the Type IV Modification to the Permit in 2003. For example, on January 14, 2003, Bio Energy LLC's consultant, GZA, submitted a Title V Operating Permit Renewal Application for Bio Energy, LLC regarding its proposed operation of the Bio Energy Facility. Section 3.2.1 of the report specifies that "Bio Energy LLC is committed to operate the Bio

Energy facility in compliance with all applicable requirements.” Section 3.2.2 of the report specifies that “Bio Energy LLC intends to operate the Bio Energy facility....”

The accuracy of the report is certified by Dell’Orfano. See, for example, the following:

- See CFNH’s Proposed Finding 42 and supporting citations.
- Intervenors’ Ex. 72 (GZA Report).
- Intervenors’ Ex. 99 (Bio Energy LLC Title V permit modification engineering summary, updated May 21, 2003; “Bio Energy owns and operates an electric utility generating station....” (INT1306)).
- Intervenors’ Ex. 75 (Bio Energy LLC correspondence to DES ARD, dated January 10, 2003)
- Intervenors’ Ex. 129 (June 15, 2004 Agreement between Dell’Orfano and DiNapoli; “Dell’Orfano and DiNapoli are the members and Manager Members of Bio Energy LLC ... engaged in the business of developing and operating an electric power-generating plant at its site in West Hopkinton, New Hampshire.”)
- Intervenors’ Ex. 35 (correspondence and reports related to Facility’s Title V Operating Permit).
- Intervenors’ Ex. 107 (Minutes of Bio Energy LLC Management Meeting, July 29, 2003: Discussing nomination of DiNapoli as a Managing Member and ... “the cash that is currently in a separate Bio Energy LLC account that was provide by Tony DiNapoli...” and Dell’Orfano’s interest in starting construction of the Facility, etc...) and Transcript III, pp. 129-133 (Dell’Orfano testimony regarding same).
- Intervenors’ Ex. 117 (Minutes of Bio Energy LLC Management Meeting, dated September 16, 2003: Discussing Dell’Orfano’s proposal “to raise additional capital in furtherance of the business plan of the LLC Mr. Dell’Orfano suggested that he would lend up to [redacted] to meet the construction deadline and other operation costs...”) and Transcript III, pp. 134-141 (Dell’Orfano testimony regarding same).
- Intervenors’ Ex. 237 (Court filing by Bio Energy LLC in litigation with Town, stating on p. 7 that “Bio Energy [LLC] intends to utilize, as it has always intended to utilize, as fuel only those woodchips expressly allowed for under its Title V permit ...”) and Transcript III, pp. 142-146 (Dell’Orfano’s testimony re same).
- Intervenors’ Exs. 127, 128, 129, 50, 30, 63, 68 and Transcript III, at pp. 147-149 (attorney Lajoie’s offer of proof regarding same).
- Transcript II, p. 91, l. 18 – p. 92, l. 10 (Smith: “Q. On a day-to-day basis in connection with your activities at the facility, am I correct that there is no distinction made between those activities conducted by you in your role as vice president of the operations for the LLC versus vice

- president of the operations for Regenesys, is that correct? A. **At this time while the facility is not physically operating, that's correct.**)
- Transcript II, pp. 97-100 (Smith).

56. Given Bio Energy LLC's responsibilities and authority with respect to the Facility, and, among other facts, Mr. DiNapoli's responsibilities and authority as a 50% owner and Member of Bio Energy LLC, and later as a Managing Member of Bio Energy LLC, and Mr. DiNapoli's direct involvement in the financing of Bio Energy LLC's activities at the Facility, Mr. DiNapoli had managerial, supervisory or substantial decisionmaking authority and responsibility for the management of Facility operations and compliance with the Permit at the time the Type IV Permit Modification Application was filed in December, 2002.

- Transcript I, p. 243, l.23 through p. 245, l. 4 (Smith).
- Transcript II, p. 84 (Smith: **"According to the lease, it's the LLC's responsibility to pay for, to fund all activities until the facility is operational and able to generate power."**).
- Transcript III, pp. 89-94 (Dell'Orfano: Discussing DiNapoli's continued involvement in Bio Energy LLC).

57. On or about February 14, 2003, Regenesys Corporation applied for a Type IA Modification to the Permit ("Type IA Modification Application") seeking authority to burn 100% processed construction and demolition wood, instead of 50%. The Type IA Modification Application contained many of the same false and/or misleading representations and omissions as the Transfer Application and otherwise omitted required information.

- Intervenor's Ex. 84 (Type IA Modification Application).

58. Among other things, it continued to falsely characterize Bio Energy LLC as merely the property owner and Regenesys as the permittee/applicant. It also included a

compliance certification regarding the “applicant” to the same effect as in the Type IV Transfer Application.

- Intervenors’ Ex. 84 (Type IA Modification Application).

59. DENIED WITH RESPECT TO “or full notification of all abutters”;

OTHERWISE GRANTED-The public hearing on the Type IA Modification

Application was held on May 22, 2003, without the benefit of complete applications, accurate information related to, among other things, the roles of the various entities owned by Messrs. DiNapoli and Dell’Orfano, information regarding Mr. DiNapoli=s conviction, a compliance statement, or full notification to all abutters.

- Intervenors’ Ex. 95 (hearing notice).
- See CFNH’s Proposed Findings 63-78 (related to application and hearing notices).

60. Because Mr. DiNapoli was an officer or director of Bio Energy Corporation when he was convicted of felony witness tampering on March 25, 2002, Mr. Dell’Orfano provided false compliance certifications in the December 2, 2002 Transfer Application and the subsequent Type IA Modification Application. With respect to the 2002 Transfer Application, Bio Energy Corp. was a named applicant and Mr. DiNapoli was an officer, director and more than 10% owner of Bio Energy Corp. at the time of his conviction. Those compliance certifications also extended to Mr. DiNapoli due to his continued involvement with Bio Energy LLC and his and the LLC’s involvement with the Facility. The regulatory definition of “applicant” includes a facility owner who has obligations to make facility modifications to comply with environmental rules, such as Bio Energy LLC. Env-Wm 102.07. The certifications were false as to Mr. DiNapoli and Bio Energy LLC due to DiNapoli=s prior conviction.

- Intervenors' Ex. 68 (Transfer Application).
- Intervenors' Ex. 84 (Type IA Modification Application).
- CFNH's Post-Hearing Memorandum (see discussion in "Argument", Section I.A).

61. The solid waste rules and transfer application form provide an avenue for disclosing information such as environmental violations and criminal convictions, through submission of a Compliance Report. It was reasonable for the DES solid waste program to expect that an applicant with concerns about disqualifying information would bring it to the agency's attention through such a report, as requested on the form.

(Amended Notice, Section III, ¶45).

- Admitted as to the first sentence; Denied as to the second (see Respondent's Answer to Amended Notice, Page 21, Section III, ¶45).

62. In making its decision to transfer the Permit, the DES solid waste program reasonably relied upon the false or misleading information supplied by Regensis officials. Because of this reliance, the DES solid waste program did not ask the AGO to investigate Mr. DiNapoli's background again in conjunction with the Transfer Application. As a result, the agency continued to be unaware of Mr. DiNapoli's felony conviction, and had no reason to believe there was any significance to the fact that he was involved with Bio Energy LLC but not with Regensis. **(Amended Notice, Section III, ¶46).**

- Intervenors' Exs. 73, 79 and 80.

63. The Bedford Corporation and PetroFiber Corporation own property abutting the Bio Energy Facility and are under the same or related ownership, management and control as Bio Energy Corporation, Bio Energy LLC and Regensis Corporation. The

most significant link is that William Dell'Orfano is either President, Managing Member, or Director of all of the above named companies and owns all or part of each company.

- Stipulated Facts as to Abutter Notification Issues, Paragraphs B.3-5 & C.3-5.
- Intervenor's Exs. 89, at INT1056; 140, at INT1588.
- Transcript II, p. 216, ll. 11-15.

64. Additionally, Anthony DiNapoli's is an owner and managing member of Bio Energy LLC, and an owner, officer and director of The Bedford Corporation and PetroFiber Corporation.

- Stipulated Facts as to Abutter Notification Issues, ¶¶ B.3-4 & C.3-4.
- Intervenor's Exs. 107, (at INT1369-1370); 133, at INT1505.

65. Notices of the application for Bio Energy Corporation's December, 2002, Type IV Solid Waste Permit Modification went to the following as abutters: The Bedford Corporation (owner of Lots 18.01, 19, 19.01, and 25.2), PetroFiber Corporation (owner of Lot 25.1), Papertech Corporation (owner of Lots 18, and 26), CHI Energy, Inc. (owner of Lot 24), and the United States of America-Hopkinton Everett Reservoir (owner of Lots 22 and 23).

- Stipulated Facts as to Abutter Notification Issues, at ¶ B.2.

66. Notices of Regenesys' February, 2003, application for a Type IA Modification to the Solid Waste Permit went to the following as abutters: The Bedford Corporation (owner of Lots 18.01, 19, 19.01, and 25.2), PetroFiber Corporation (owner of Lot 25.1), Papertech Corporation (owner of Lots 18, and 26), CHI Energy, Inc. (owner of Lot 24), and the United States of America-Hopkinton Everett Reservoir (owner of Lots 22 and 23).

- Stipulated Facts as to Abutter Notification Issues, at ¶ C.2.

67. PetroFiber Corporation is a Delaware Corporation located at 749 East Industrial Drive, Manchester, NH 03109. William Dell=Orfano and Anthony DiNapoli are its owners, officers and directors.
- Stipulated Facts as to Abutter Notification Issues, at ¶¶ B.3 & C.3.
 - Intervenor's Ex. 89, at INT1056 and Ex. 143, at INT1697-1700.
68. The Bedford Corporation is a Nevada Corporation also located at 749 East Industrial Drive, Manchester, NH 03109. William Dell=Orfano and Anthony DiNapoli are its owners, officers and directors.
- Stipulated Facts as to Abutter Notification Issues, at ¶¶ B.3 & C.3.
 - Intervenor's Ex. 89, at INT1056 and Ex. 142, at INT1668-1675.
69. Notices of the Transfer Application to both PetroFiber Corporation and The Bedford Corporation were sent on December 2, 2002 to the same address: Ac/o Bio Development, 749 East Industrial Park Drive, Manchester, NH 03109.@ This was also an address of Bio Energy Corp., Bio Energy LLC and Regenesys Corp.
- Stipulated Facts as to Abutter Notification Issues, at ¶ B.2.
 - Regenesys' Exs. 43 & 48.
 - Intervenor's Exs. 59, 60, 68 (at INT0731-0734, INT0739 & INT0744), 78, and 140 (at INT1582-1583, INT1585-1589).
70. The Notices of the Transfer Application that were sent to PetroFiber Corporation and The Bedford Corporation were received by the same person.
- Regenesys' Ex. 43.
71. Notices of the Type IA Modification Application to both Petrofiber Corporation and The Bedford Corporation were sent on January 16, 2003 to the same address: Ac/o Xgenesys Development, 749 East Industrial Park Drive, Manchester, NH.@ This was the same address listed for the applicant, Regenesys itself and the owner, Bio Energy, LLC.
- Regenesys' Ex. 50.

- Intervenor's Ex. 59; 60; 78; 84, (at INT0872; 86, at INT0930, INT0936, INT0945, INT0947-0948); and 140, (at INT1582-1583, INT1585-1589).
72. Janice J. Dell'Orfano received the notice of the Type IA Modification Application for both PetroFiber Corporation and The Bedford Corporation.
- Regenesys' Ex. 50.
73. Martin and Donna Grady, III own properties that abut The Bedford Corporation at 1468 Maple Street, Contoocook, New Hampshire, 03229. These properties are located on Map 218, Lots 2, 3 and 60.
- Intervenor's Ex. 146, (at INT1725-1727, INT1754-1755).
 - Regenesys' Ex. 42.
74. Stonynook Farm, Inc. owns property that abuts The Bedford Corporation at 47 Emerson Hill Road, Contoocook, New Hampshire, 03229. This property is located on Map 210, Lot 15.
- Intervenor's Ex. 146, (at INT1732 & INT1754).
 - Regenesys' Ex. 42.
75. Roger and Norma Andrus own property that abuts The Bedford Corporation at 197 Rolfe Pond Drive, Contoocook, New Hampshire, 03229. This property is located on Map 210, Lot 16.
- Intervenor's Ex. 146, (at INT1733 & INT1754).
 - Regenesys' Ex. 42.
76. Notice of the 2002 Type IV Transfer Application was not sent to Martin and Donna Grady, III, Stonynook Farm, Inc., or Roger and Norma Andrus.
- Stipulated Facts as to Abutter Notification Issues, at ¶¶ B.2 & B.6.
77. Notice of the 2003 Type IA Modification Application was not sent to Martin and Donna Grady, III, Stonynook Farm, Inc., or Roger and Norma Andrus.

- Stipulated Facts as to Abutter Notification Issues, at ¶¶ C.2 & C.6.

78. By statute, DES is charged with conducting fair and procedurally proper permit proceedings.

- Admitted (see Respondent's Answer to Amended Notice, Page 26, Section II, ¶ 52).

E. The Town of Hopkinton's Requests for Findings of Fact was provided in memorandum form (dated May 20, 2005) and are granted or denied consistent with the findings of fact in this decision.

III. Analysis

A. Whether William Dell'Orfano made a false or misleading statement when he certified in December of 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for a permit transfer.

At the heart of Regenesys' case is the oft-made assertion that Mr. Dell'Orfano's certification that none of Bio Energy's officers or directors had been convicted of a felony within five years of the application date was "totally" truthful. *See, e.g.,* Memorandum of Law in Support of Regenesys Corporation, p. 1. Regenesys interpreted the applicable rules and disclosure form instructions to apply only to then-current officers, directors and partners of the "existing permittee", inexplicably without verifying with the Department whether it agreed with such a narrow interpretation. In my opinion, Mr. Dell'Orfano's certification did not comply with the requirements for disclosing the prior felony convictions of all of the permittee's officers, directors and partners. His certification that no such person had been convicted was not completely truthful in the way that DES, and most people, would understand and expect from a business filling out a government certification form.

The importance that the Legislature ascribed to preventing organizations associated with convicted felons from obtaining solid waste permits is apparent from the provisions of RSA 149-M:9, which require that a solid waste permit applicant undergo a background investigation by the Attorney General, and authorize DES to deny a solid waste permit to an organization whose principals have been convicted of a felony within five years of seeking a permit. The Department's Solid Waste Rules prohibit the issuance of a permit to an organization associated with a convicted felon, unless a convincing case can be made for granting the permit.

The Attorney General's Office conducts a thorough criminal background check on all applicants for solid waste permits and subsequent transfers and modifications, and reports its findings to DES. The instructions on the Attorney

General's Business Concern Disclosure Form filed by Mr. Dell'Orfano on behalf of Bio Energy Corporation and Regenesis (*See, e.g., State's and Respondent's Joint Exhibits, Exhibit 3*) describe who must complete the form ("Owners, directors, officers, partners, certain equity and debt holders and key employees"), and state the level of candor and honesty that is expected:

3. ANSWER COMPLETELY AND TRUTHFULLY. Failure to answer all questions completely and truthfully may result in ... permit denial or revocation, and in penalties under RSA chapter 641.

...
Be especially careful not to leave out information in a way that might create an impression that you are trying to hide it. For example, a minor criminal conviction probably would not disqualify the applicant, but attempting to conceal the conviction may lead to a finding of untrustworthiness, and result in disqualification. Omitting such information from this form, even unintentionally, may result in your trustworthiness being questioned.

Solid waste permit applications contain a separate requirement that an applicant certify that no related entity or individual has been convicted of any felony. The Certification of Compliance section of the Type IV Permit Modification application that was signed by Mr. Dell'Orfano certified as true that "No individual or entity listed above has been convicted of or plead (sic) guilty or no contest to a felony in any state or federal court during the 5 years before the date of the application." The individuals or entities "listed above" included "all of the existing permittee's officers, directors and partners; and all individuals and entities having managerial, supervisory or substantial decisionmaking (sic) authority and responsibility for the management of facility operations."

The certification language refers to the "existing" permittee, but it is not limited to "existing" officers, directors or partners of the existing permittee, as Regenesis now argues. To the contrary, the scope of the certification is defined as "all" of the existing permittee's officers, directors and partners. "All" of an applicant's officers, directors and partners necessarily includes present and former holders of those positions. This requirement derives from the wording of the certification itself, in contrast to the interpretation of the wording argued by Regenesis, which is based on words ("existing" or "current") that do not appear in the statute, rules or application forms. It is also consistent with fulfilling the legislative intent underlying the statutory and regulatory schemes for issuing solid waste permits, which, like all governmental processes, are dependent upon the provision of accurate and complete information by the applicants.

The "existing permittee" in the 2002 transfer application was Bio Energy Corporation. The application was submitted to DES on December 6, 2002. Mr. DiNapoli had been an officer in the corporation, and he had been convicted of a felony on March 25, 2002. Mr. Dell'Orfano's certification that no corporate officer or director had been convicted of a felony within five years of the application date was not rendered true by

the mere device of having Mr. DiNapoli resign from the corporation. The certification was not complete, it was less than candid, and it was literally false.

Because it was false, it was also misleading. Lacking accurate information about Mr. DiNapoli's criminal background, DES approved the transfer of the permit to Regenesi on March 28, 2003 without knowledge that Bio Energy Corporation might not be eligible to hold it or transfer it. The original permit had been issued to Bio Energy on May 28, 2002, *after* Mr. DiNapoli's conviction (he, too, having failed to amend or withdraw a Personal History Disclosure Form that was no longer accurate), a circumstance that made the permit voidable, rather than transferable.

B. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the failure to disclose a felony conviction of a corporate principal.

Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that there are no circumstances by which the permittee can correct or eliminate the underlying problem. Env-Wm-306.05 defines good cause to include: violation of RSA 149-M or the Solid Waste Rules; discovery that a permit was issued based on false or misleading information; or meeting any other criteria for permit denial. Other criteria for permit denial include felony conviction of the applicant or one of its officers, directors or partners during the five years prior to the application, and the applicant's failure to demonstrate sufficient reliability, expertise, integrity and competence to operate a solid waste facility.

The ANPLA alleged that the permit should be revoked based on Mr. Dell'Orfano's false and misleading statement that none of Bio Energy Corporation's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer. DES proved by a preponderance of the evidence that the Bio Energy Corporation solid waste permit was transferred to Regenesi based, in part, on the false and misleading certification by Mr. Dell'Orfano that no corporate principals had been convicted of a felony within the relevant five year period. The false certification by Mr. Dell'Orfano in his role as agent for both Bio Energy Corporation and Regenesi, misled DES with respect to whether the existing permittee met an important statutory and regulatory criterion for holding a solid waste permit. Mr. Dell'Orfano's provision of the false and misleading certification that no corporate principal has been convicted of a felony within five years of the transfer application is good cause to revoke the permit.

C. Whether Mr. Dell'Orfano provided misleading or incomplete information to DES by failing to disclose that Bio Energy Corporation had been dissolved in the 2002 transfer application.

In an effort to avoid the impact of Mr. DiNapoli's conviction on the continued operation of the Facility, Mr. Dell'Orfano orchestrated a series of organizational changes intended to cure the "problem". For unrelated tax reasons, Bio Energy

Corporation sold the Facility (and all of its permits "to the extent transferable") to Bio Energy LLC on June 12, 2002. Bio Energy Corporation was dissolved on August 30, 2002. Mr. DiNapoli was also a principal in Bio Energy LLC, so a third company was brought in to the mix, the current permit holder and respondent in this proceeding, Regenesis. On December 2, 2002, Bio Energy Corporation, Bio Energy LLC and Regenesis filed an application with DES to transfer the permit to Regenesis that did not disclose that Bio Energy Corporation had been dissolved. On December 6, 2002, Bio Energy LLC leased the Facility to Regenesis.

The Solid Waste Rules require a permittee to obtain a Type IV permit modification before any "change in the: (1) Operational control of a facility; or (2) Ownership of the facility...". See Env-Wm 315.02(f) and Env-Wm 315.03(b)(4). No such approval was sought with respect to the dissolution of Bio Energy Corporation and the conveyance of its assets to Bio Energy LLC. It was a violation of the Solid Waste Rules for Bio Energy Corporation to delay seeking DES approval for the dissolution of the corporation and the transfer of operational control and ownership of the facility while it attempted to address the permitting difficulty presented by Mr. DiNapoli's conviction.

On the transfer application, Mr. Dell'Orfano signed a statement representing on behalf of Bio Energy Corporation and Regenesis that "the information and material submitted herewith is correct and complete." This statement is not accurate. The unapproved transfer of Bio Energy Corporation's assets and its subsequent dissolution were not disclosed on the application. The transfer application was incomplete and misleading with respect to important and material information- the current corporate existence of the permittee, Bio Energy Corporation and an explanation how its responsibilities under the permit had been extinguished without approval by DES. Lacking accurate information about the legal status of the permit holder, DES approved the transfer of the permit to Regenesis on March 28, 2003 without knowledge that Bio Energy Corporation might not be legally capable of transferring it.

D. Whether good cause exists as provided in Env-Wm 306.05, to revoke the permit based on the failure to disclose the dissolution of Bio Energy Corporation.

The failure of Bio Energy Corporation, Bio Energy LLC and Regenesis to obtain timely approval for modifications to the permit violated the Solid Waste Rules and constitutes good cause to revoke the permit. The failure to disclose the dissolution of Bio Energy Corporation on the 2002 permit transfer application was misleading and also constitutes good cause to revoke the permit.

The ANPLA, however, did not directly allege that the permit should be revoked based on a violation for the failure to disclose the dissolution of Bio Energy Corporation in the transfer application. Accordingly, the permit cannot be revoked on this basis.

E. Whether the alleged failures to disclose the felony conviction or the dissolution of Bio Energy Corporation demonstrate that Regenesi Corporation lacks the reliability and integrity to operate a solid waste facility.

A solid waste permit applicant or permit holder must expect to, and be expected to, make an honest and complete disclosure of all relevant information, including prior criminal convictions, for the permitting process to protect the public interest. Bio Energy Corporation, Bio Energy LLC and Regenesi failed to candidly disclose Mr. DiNapoli's conviction and the dissolution of Bio Energy Corporation, despite the Solid Waste Rule requirements for DES approval of permittee ownership changes and the disclosure of felony convictions for all officers, directors, partners or managers. As described above, the false and misleading nature of the failure to disclose Mr. DiNapoli's conviction warrants a finding of good cause to revoke the permit.

I do not believe, however, that the evidence relating to these failures supports a finding that the current permit holder, Regenesi, lacks the reliability and integrity to operate a solid waste facility. As credibly described by Mr. Dell'Orfano, the companies' actions (and inactions) were part of a strategy to isolate Mr. DiNapoli from the core business to bring it into compliance with the regulatory restraints on association with convicted felons. The strategy was based, at least in part, on advice from competent and ethical legal counsel. Mr. DiNapoli's conviction was a matter of public record; there is no rational basis for inferring that Regenesi actually expected or intended to prevent DES from learning of the conviction.

F. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the permittee's lack of reliability and integrity.

Good cause does not exist to revoke the permit based on the permittee's alleged lack of reliability and integrity.

G. Whether the required notices to abutters in the 2002 transfer proceeding and the 2003 permit modification proceeding complied with Env-Wm 303.05 (d), and, if not, whether either of these prior proceedings should be reopened.

The Solid Waste Rules require that notice of filing of a solid waste permit or modification application be provided to owners of property abutting the facility site. Env-Wm 303.05(d) provides that if the applicant or the owner of the facility site owns any abutting parcel of land, the notice must be sent to the owner of the next parcel not owned by the applicant or facility site owner. Notices of the 2002 transfer application and the 2003 modification proceeding were mailed to the Bedford Corporation, PetroFiber Corporation, Papertech Corporation and the United States of America-Hopkinton Everett Reservoir as owners of record of parcels abutting the Facility site.

The Bedford Corporation and Papertech Corporation share common ownership, management or control with Bio Energy Corporation, Bio Energy LLC and Regenesi

through the participation of Mr. Dell'Orfano in all of the entities. They are, however, separate legal entities for purposes of property ownership.

The notices provided to the above-named abutters complied with Env-Wm 303.05(d). The Solid Waste Rules do not require that notices be provided to additional unrelated abutting property owners if parcels adjacent to a facility site are owned by persons or entities who are legally distinct from the applicant or permittee but share a commonality of ownership or control .

IV. Conclusions of Law

The following legal conclusions are supported by the facts and law in this case (with unsupported requests marked "DENIED"):

A. DES REQUESTS (Numbered as in requesting document)

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted NET CODE ADMIN. RULES Env-Wm 100— 300, 2100 et seq. ("Solid Waste Rules") to implement this program.

2. Pursuant to RSA 149-M:9, any person who wishes to construct, operate, or initiate closure of a public or private solid waste facility must first obtain a permit from DES. Under RSA 149- M:9, XII, no solid waste permit may be transferred to any other person without prior written approval of DES.

3. Under RSA 149-M:9, IX(a), DES may deny a solid waste permit application if the applicant "fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility."

4. Under RSA 149-M:9, IX©, DES may deny a solid waste permit application " the case of a corporation or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of... a felony in any state or federal court during the 5 years before the date of the permit application."

5. Pursuant to RSA 149-M:9, III, upon request of DES "the attorney general shall conduct a background investigation of the performance history and criminal record of the applicant and of its officers and directors, if any, and make a report to the department." DES may also request a background investigation of the applicant in conjunction with an application to transfer a permit. RSA 149-M:9, XII(a).

6. Env-Wm 316 specifies which entities and individuals must complete personal history disclosure forms and what information must be provided, and directs that

these forms be submitted directly to the Attorney General's Office ("AGO"), rather than to DES.

7. Wm 303.14(a) and (b)(1) require an applicant for a solid waste permit to certify that no individual holding 10% or more of the applicant's debt or equity, and none of the applicant's officers, directors, partners or managers, have been convicted of a felony during the 5 years before the date of the application.

8. Env-Wm 316.02(a)(3) specifically requires certification under Env-Wm 303.14 for applications to transfer ownership or operational control of a solid waste facility. By operation of Env-Wm 315.08, which establishes the existing permittee and the proposed permittee as co applicants for a permit transfer, the certification is required for both the existing permittee and the proposed permittee.

9. Env-Wm 303.15 provides that applicants unable to certify compliance pursuant to Env-Wm 303.14 must instead submit a compliance report explaining the circumstances which prevent certification and the reason(s) why those circumstances should not be grounds for denying the requested approval.

37. Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that "are no circumstances by which the permittee can correct or eliminate the underlying problem ...

38. Env-Wm 306.05 specifies the circumstances which provide "good cause" for revoking a permit. These circumstances include violation of chapter RSA 149-M or the Solid Waste Rules (RSA 149-M: 12, III; Env-Wm 306.05(a)), discovery that a permit was issued based on false or misleading information (Env-Wm 306.05(b)), or meeting any other criteria for permit denial (Env-Wm 306.05(c)).

39. Criteria for permit denial include the applicant's failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility, per RSA 149-M:9, JX(a).

40. Criteria for permit denial also include conviction of the permittee or one of its officers or directors during the five years prior to the application, per RSA 149-M:9, IX©.

48. RSA 149-M:9, VIII requires the applicant for a solid waste facility permit to notify abutters of the public hearing on the application in writing by certified mail, return receipt requested.

49. Env-Wm 303.05(d) requires that, if the applicant or the owner of the facility site owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant or facility site owner

State's Requests for Findings of Fact and Conclusions of Law-May 20, 2005

150. Regensis deliberately omitted relevant facts from its permit transfer application.
151. DENIED-Regensis officials' actions show a lack of integrity and reliability.
152. Unlike a violation of the technical requirements imposed on solid waste facilities, there is no way to remedy a lack of integrity and reliability.
153. The only appropriate remedy is to revoke the permit.
154. DENIED-The solid waste facility permit held by Regensis is hereby revoked due to the company's lack of reliability and integrity.

B. REGENESIS REQUESTS (Numbered as in requesting document)

Respondent's Proposed Findings of Fact and Conclusions of Law-May 20, 2005

52. Under the Solid Waste Rules, notice of filing a Standard Permit, Type IV modification permit, or Type IA modification permit application, must be given to abutters by certified mail, return receipt requested, or by hand delivery. Env-Wm 303.05(a)-(b); id. 314.08(a) (standard permits); id. 315.05(j) (Type I modifications); id. 315.08(g) (Type IV modifications).

53. In addition, with respect to permits or permit modifications that require a public hearing, the applicant must provide notice of the public hearing to, among others, abutters of the facility. See id. 304.08(i).

54. Env-Wm 303.05(d) provides that "If the applicant or the owner of the facility site owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant or facility site owner."

55. Env-Wm 304.08(i) contains a similar provision for notices of public hearing.

56. To determine whether these provisions have been complied with, it is necessary to determine if the applicant or the facility owner owned any parcel of land abutting the facility.

57. As found in Finding no. 47, Bio Energy Corporation (the owner of the facility at the time of the standard permit application, the existing permittee and the applicant in the standard permit and transfer permit applications) at no time owned any of the parcels of land abutting the facility.

58. As found in Finding no. 47, Regensis Corporation (the applicant in the transfer and Type IA modification applications) at no time owned any of the parcels of land abutting the facility.

59. As found in Finding no. 47, Bio Energy, LLC (the owner of the facility site at the time of the transfer and Type IA modification applications) at no time owned any of the parcels of land abutting the facility.

60. Thus, by their terms Env-Wm 303.05(d) and 304.08(i) are inapplicable. The respective companies provided all required notice under the Solid Waste Rules and there exists no reason to reopen the various applications.

61. DENIED-I specifically reject the Intervenor's argument that Env-Wm 303.05(d) and 304.08(i) are implicated merely because the shareholders of companies that owned certain abutting parcels of land were also shareholders in the facility owner, Bio Energy, LLC.

62. The terms of the rule are clear on their face and require notice to distant property owners when the entity that owns the facility or the applicant also owns the abutting parcels of land. That is not the case here.

63. DENIED-Neither the Solid Waste Rules nor RSA 149-M require an applicant to disclose that it has filed articles of dissolution with the Secretary of State.

64. In fact, the business disclosure forms that are part of the Attorney General's background investigation do not contain any questions regarding dissolution. See Day 1 Transcript at I-81.

65. DENIED-Thus, even if Respondent failed to inform DES of Bio Energy Corporation's dissolution, it would not constitute good cause under Env-C 306.05 for permit revocation.

66. DENIED-In any event, Respondent did inform DES of Bio Energy Corporation's dissolution, through disclosure to the Attorney General that Bio Energy Corporation was "winding up," see Exh. 41 at "Page 10," by providing copies of the purchase and sale agreement to DES, see Day 1 Transcript at I-212, which documented that all of Bio Energy Corporation's assets (and permits to the extent transferable) were to be transferred to Bio Energy, LLC, and by providing to the DES a copy of the operating lease between Regenesys and Bio Energy, LLC, see Day 3 Transcript at III-49; Day 1 Transcript at I-171, which also established that Bio Energy, LLC then owned the facility.

67. DENIED-Thus, DES knew or, at the very least, should have known of Bio Energy Corporation's dissolution.

68. DENIED-As found in Finding no. 30, Mr. Dell'Orfano's certifications in the December 2002 transfer applications were true.

69. DENIED-I reject the State's and Intervenors' arguments that Env-Wm 303.14(a) requires disclosure of a felony conviction of an officer, director, or shareholder who was affiliated with the applicant at the time of conviction.

70. DENIED-Env-Wm 303.14(a) does not require disclosure of the felony convictions of "former" officers, shareholders, directors, etc. Rather, as made plain by the language of the Rule and DES' application forms, the individual certifying must identify existing officers, shareholders, directors and then certify that none of those individuals has been convicted of a felony within the preceding five years.

71. Because Anthony DiNapoli resigned from Bio Energy Corporation and returned his shares on August 29, 2002, he was not an existing officer, director, or shareholder on December 6, 2002, the date of Mr. Dell'Orfano's certification.

72. DENIED-Thus, Mr. Dell'Orfano truthfully certified that none of Bio Energy Corporation's officers, directors, or shareholders had been convicted of (or pleaded guilty or no contest to) a felony, within the preceding five years.

73. DENIED-I also reject the State's argument that it was misleading not to disclose Mr. DiNapoli's conviction because of his status as member of Bio Energy, LLC.

74. The Solid Waste Rules do not require disclosure of the conviction of a member, officer, director, or shareholder of the property owner. See Env-Wm 303.14(a)(2) (requiring disclosure of convictions of owner itself). When the Rules require disclosure of the convictions of individual officers, shareholders, or

directors of an entity, the requirement is made express. See Env-Wm 303.14(a)(5) (requiring disclosure of convictions of applicant's officers, directors, and partners).

75. DENIED-Because the Rules do not require the disclosure, it is not misleading to refrain from making the disclosure.

76. DENIED-Furthermore, the facts establish that Anthony DiNapoli had no operational role in the facility. See Finding No. 25 supra. Failure to disclose the conviction of an individual that has no input or responsibility for operations of a solid waste facility is not, as a matter of law, misleading.

77. DENIED-Because William Dell'Orfano's December 2002 certifications were truthful and not misleading, there is not good cause to revoke the permit.

78. DENIED-The State has also contended that, due to the shaking of DES' trust in Regenesys, revocation is proper even if there is no regulatory requirement to disclose Mr. DiNapoli's conviction. I reject the contention.

79. DENIED-First, the length of time between this revocation proceeding and October 2003, when DES officials became aware of the conviction, undercuts any claim that DES officials placed great importance on the failure to disclose. Second, DES may not revoke a permit based on a disclosure requirement not found in the Solid Waste Rules. See Appeal of Nolan, 134 N.H. 723, 727-28 (1991) (prohibiting oral rulemaking); Appeal of Monsier Henri Wines, 128 N.H. 191, 194-96 (1986) (rejecting argument that broad language in enabling regulation allowed Liquor Commission to refuse to list liquor based on grounds not among those enumerated in regulations).

80. DENIED-Accordingly, the proposed license action of revocation is rejected.

C. REACH'S REQUESTS (Numbered as in requesting document)

REACH'S Summary of and Proposed Findings of Fact and Rulings of Law-May 20, 2005

1. Respondent violated RSA 149-M on or around June 12, 2002 and thereafter.
 - a. The purported transfer of the solid waste permit for the Bio Energy Facility, from Bio Energy Corporation to Bio Energy LLC, by private agreement (a P&S Agreement) on or about June 12, 2002, without notice to and approval from NHDES, constituted a violation of RSA 149-M.
 - b. Pursuant to Env-Wm 315.02(f) and 315.03(a)-(b), pre-approval for a Type IV modification is required whenever there is a change in operational control or ownership of a facility.
 - c. If a Type IV modification had been sought, as required prior to this June 12, 2002 transaction, NHDES would have been made aware of Anthony Dinapoli's felony conviction by virtue of disclosure of the information relating to both Bio Energy Corporation and Bio Energy LLC as specified in Env-Wm 315.08 and Env-Wm 316, by operation of Env-Wm 315.03(b)(4).
 - d. The argument that this private agreement to transfer ownership was not effective as to the solid waste permit (only), because NHDES did not approve it, is circular and illogical, given that this argument could be used to justify any violation of RSA 149-M (or any administrative or criminal standard) by allegedly "excusing" the violative act as unauthorized and therefore a nullity. Simply because an act is claimed to be beyond the scope of legitimate corporate authority, and therefore void and/or *ultra vires* as a matter of contract law, does not mean that it did not occur. Bio Energy Corporation and Bio Energy, LLC cannot validly defend actions that violated legal standards set forth in administrative and/or criminal law by claiming that such activities are not contemplated in the contract between the parties. By Respondent's erroneous logic, no corporation (or similar entity) could ever violate an regulatory or criminal law, so long as such entities lack legitimate corporate or contractual authority to undertake the offending acts. See, e.g., RSA 293-A:3.04 ("No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid because the corporation was without capacity or power to do the act or to make or receive the conveyance or transfer," with certain exceptions for shareholder actions, actions against former officers and directors, and actions by the State to dissolve or prohibit unauthorized business).

- e. Furthermore, the failure to notify NHDES of the dissolution of Bio Energy Corporation, and subsequent representations that Bio Energy Corporation continued to hold and was transferring the solid waste permit for the Bio Energy Facility, despite a prior transfer of said permit, violated RSA 149-M and was deceptive and misleading. "An intentional misrepresentation requires a misstatement of fact for the purpose of inducing another to act or to refrain from action in reliance upon it." Basbanes' Case, 141 N.H. 1, 6 (1996); see also Carpenito's Case, 139 N.H. 168, 174 (1994). A negligent misrepresentation requires "a negligent misrepresentation of a material fact by the defendant and justifiable reliance by the plaintiff. It is the duty of one who volunteers information to another not having equal knowledge, with the intention that he [or she] will act upon it, to exercise reasonable care to verify the truth of his [or her] statements before making them." Snierson v. Scruton, 145 N.H. 73, 78 (2000) (quoting Hydraform Prods. Corp. v. American Steel & Alum. Corp., 127 N.H. 187, 200) (1985) and Patch v. Arsenault, 139 N.H. 313, 319 (1995)) (quotations and citations omitted).

2. Respondent violated RSA 149-M on or around June 12, 2002, August 31, 2002 and thereafter.

- a. Furthermore, alternatively, if Bio Energy Corporation was somehow the permittee as of the December 2002, it was therefore necessarily the permittee up until that time and was required to obtain a Type I-B modification when it changed the facility's name and all of the property and permits (other than the solid waste permit) to Bio Energy LLC, and when Anthony Dinapoli was removed as an officer, director and shareholder from Bio Energy Corporation. These actions violated RSA 149-M.
- b. Pursuant to Env-Wm 315.02(e) and 315.03(a)-(b), pre-approval for a Type III modification is required whenever there is a change in name, organizational structure, officers or directors for a facility that does not constitute a Type IV modification. Pursuant to Env-Wm 315.01(c), if the facility is not able to satisfy the requirements of Env-Wm 303.14, a Type I-B modification is required.
- c. If a Type I-B modification had been sought, as required prior to the June 12, 2002 and August 31, 2002 transactions, NHDES would have been made aware of Anthony Dinapoli's felony conviction by virtue of disclosure of information relating to Bio Energy Corporation and Bio Energy LLC as specified in Env-Wm 315.07 and Env-Wm 316, by operation of Env-Wm 315.03(b)(1).

3. Respondent violated RSA 149-M on or around June, 2002 and thereafter.

- a. The entire complex corporate and contractual artifice undertaken willfully by Respondent, between June, 2002 and December 2002, and ongoing thereafter, was expressly designed and intended to avoid any disclosure of Anthony Dinapoli's involvement with multiple entities involved with the Bio Energy Facility and multiple aspects of said Facility.
- b. This willful course of action was also expressly designed and intended to avoid filing a compliance statement with NHDES in conjunction with Env-Wm 303.15.
- c. This willful course of action was also devised and executed, following careful study and over a protracted period of time, in consultation with sophisticated environmental law counsel.
- d. This willful course of action was undertaken despite the fact that Respondent was aware that NHDES would have concerns and questions regarding the subject matter intended to be obfuscated.
- e. Although there has allegedly been an *intention* to "remove" Anthony Dinapoli from any involvement with the Bio Energy Facility, he has, in fact, never been removed from his involvement with the ownership and operation of said Facility, and continues to have a substantial ownership, operational, managerial, financial and beneficial relationship with the Facility and the various entities involved therewith, including but not limited to Bio Energy LLC.
- f. This willful course of action violated RSA 149-M and was deceptive and misleading.

4. Respondent violated RSA 149-M on or around December 2, 2002 and thereafter.

- a. In light of Anthony Dinapoli's ongoing ownership and management of Bio Energy LLC, and Bio Energy LLC's substantial involvement with the management and operation of the Bio Energy Facility, Respondent did not accurately or truthfully certify, under oath, a Compliance Certification dated December 2, 2002, indicating that pursuant to Env-Wm 303.14(a)(6), "[a]ll individuals and entities having managerial or supervisory or substantial decision-making authority and responsibility for the management of facility operations or the activity(s) for which approval is being sought" met the requirements of Env-Wm 303.14(b).
- b. Although there was allegedly an *intention* to "remove" Anthony Dinapoli from any involvement with the Bio Energy Facility as of the date of the Compliance Certification, he had not been, in fact, removed from his involvement with the ownership and operation of said Facility, and, in fact, had (and has) managerial and/or supervisory and/or substantial decision-making authority and responsibility for the management of facility operations or the activity(s) for which approval was being sought.

5. Respondent violated RSA 149-M on or around December 15, 2002 and thereafter.
- a. The purported assignment of operational responsibility from Bio Energy LLC to Regenesys Corporation, by private agreement (a lease) on or about December 15, 2002, without notice to and approval from NHDES, constituted a violation of RSA 149-M.
 - b. Pursuant to Env-Wm 315.02(f) and 315.03(a)-(b), pre-approval for a Type IV modification is required whenever there is a change in operational control of a facility.
 - c. If a Type IV modification had been sought, as required prior to this December 15, 2002 transaction, NHDES would have been made aware of Anthony Dinapoli's felony conviction by virtue of disclosure of the information relating to Bio Energy LLC as specified in Env-Wm 315.08 and Env-Wm 316, by operation of Env-Wm 315.03(b)(4).
6. Bio Energy LLC's past and ongoing activities at the Bio Energy Facility (with Anthony Dinapoli as a owner and manager), violate RSA 149-M.
- a. Pursuant to RSA 149-M:4,IX, a solid waste "facility," subject to the various requirements of RSA 149-M *et seq.*, is any "system, or physical structure for the collection, separation, storage, transfer, processing, treatment, or disposal of solid waste."
 - b. Pursuant to RSA 149-M:6,III, "[t]he [DES] shall have the responsibility and authority to . . . [r]egulate facilities through administration of a permit system." (emphasis added).
 - c. Pursuant to RSA 149-M:9,I, "[n]o person shall construct, operate, or initiate closure of a public or private facility without first obtaining a permit from the department." (emphasis added); see also RSA 149-M:4,XIV ("permit" defined as "an authorization from the department for the construction and operation of a facility") (emphasis added); North Country Env'tl. Servs. v. Town of Bethlehem, 150 N.H. 606, 614 (2004) ("[a] State permit is required before one constructs, operates or initiates the closure of a solid waste management facility," and holding "that RSA chapter 149-M a comprehensive and detailed regulatory scheme governing the design, construction, operation and closure of solid waste management facilities") (emphasis added).
 - d. There is no limitation on these unambiguous requirements of RSA 149-M *et seq.*, in any way supportive of Respondent's linguistic parsing so as to somehow limit clear statutory permit requirements and NHDES's jurisdiction to: (a) only the "operation" of; (b) *certain* conceptually-delineated activities within a facility.
 - e. Rather, a permit is required for any entity that intends to: (a) design, construct, operate or initiate closure of; (b) a facility which constitutes a

system, or physical structure for the collection, separation, storage, transfer, processing, treatment, or disposal of solid waste.

- f. Bio Energy LLC is acting unlawfully relative to the Bio Energy Facility given that it does not hold a solid waste permit, and furthermore due to Anthony Dinapoli's substantial involvement with Bio Energy LLC as an owner and manager.

7. The required remedy for any or all of the foregoing violations of RSA 149-M is license revocation.

- a. Pursuant to RSA 149-M:9,XI, "[a]ll permits...may be suspended or revoked for cause as provided in this chapter [RSA 149-M *et seq.*]"
- b. "RSA 149-M:7 grants NHDES broad authority to adopt rules necessary to enforce RSA chapter 149-M." North Country Env'tl. Servs. v. Town of Bethlehem, 150 N.H. 606, 614 (2004).
- c. Pursuant to Env-Wm 306.04, "(a) A permit shall be revoked if the department determines...that: (1) Good cause as provided in Env-Wm 306.05 exists; and (2) There are no circumstances by which the permittee can correct or eliminate the underlying problem."
- d. Good cause includes a finding that "[I]ssuance of the permit was based on false or misleading information." Env-Wm 305.06(b).
- e. Good cause includes a finding that "[t]he permit holder has committed a violation of [RSA 149-M], or any rule, plan, order, or permit conditions in force under it." Env.-Wm 305.06(a) (referencing standard set forth in RSA 149-M:12, which includes the foregoing language at RSA 149-M:12,II(a)).
- f. Good cause includes a finding that a permit was issued based on false or misleading information. Env-Wm 306.05(b).
- g. Good cause includes a finding that the permittee or the facility meets any other criteria for initial permit denial, including a failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility. Env-Wm 306.05(c); Env-Wm 305.03(a)(1); RSA 149-M:9, IX(a).
- h. Good cause includes a finding that the permittee, "[i]n the case of a corporation or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of ... a felony in any state or federal court during the 5 years before the date of the permit application." Env-Wm 306.05(c); Env-Wm 305.03(a)(1); RSA 149-M:9,IX(c).
- i. The solid waste rules relating to Performance History Requirements are "intended to provide the [NHDES] with the information necessary to determine, as provided in RSA 149-M:9,III and IX, whether an applicant, owner, facility operator, or any of the applicant's officers, directors, partners, key employees, or major debt or equity holders, has been convicted of or pled guilty or no contest to a felony within 5 years of the

date of the permit application, or has failed to demonstrate sufficient reliability, expertise, integrity and competence to operate a solid waste facility.” Env-Wm 316.01

- j. In this case, in light of the record and the foregoing, the nature of Respondent’s multiple violations of RSA 149-M entail and implicate, *inter alia*, fundamental misrepresentations and misleading acts, upon which Respondent’s permit and ongoing licensure were premised, and relating to the past and ongoing control, ownership and operation of the subject Facility by those same entities and principals responsible for said misrepresentations and misleading acts. This is precisely the type of scenario for which the remedy of license revocation was designed, given that there are no circumstances by which the permittee could correct or eliminate such a violation or breach of the public trust. The Respondent has demonstrated that it lacks sufficient reliability, expertise, integrity and competence to operate a solid waste facility.
- k. Permanent revocation of Respondent’s solid waste permit is mandated by the evidence and the applicable legal standards.

D. CFNH’S REQUESTS (Numbered as in requesting document)

CFNH’s Proposed Findings of Fact and Conclusions of Law-May 20, 2005

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted NH CODE ADMIN. RULES Env-Wm 100 - 300, 2100 *et seq.* (“Solid Waste Rules”) to implement this program. (Amended Notice, Section III, ¶1).

➤ Admitted (see Respondent’s Answer to Amended Notice, Page 1, Section III, ¶1).

2. Pursuant to RSA 149-M:9, any person who wishes to construct, operate, or initiate closure of a public or private solid waste facility must first obtain a permit from DES. Under RSA 149-M:9, XII, no solid waste permit may be transferred to any other person without prior written approval of DES. (Amended Notice, Section III, ¶2).

➤ Admitted* (see Respondent’s Answer to Amended Notice, Page 1, Section III, ¶2).

3. Under RSA 149-M:9, IX(a), DES may deny a solid waste permit application if the applicant “fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility.” (**Amended Notice, Section III, ¶(3).**

➤ Admitted (see Respondent’s Answer to Amended Notice, Page 2, Section III, ¶(3).

4. Under RSA 149-M:9, IX©, DES may deny a solid waste permit application “[i]n the case of a corporation or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of ... a felony in any state or federal court during the 5 years before the date of the permit application.” (**Amended Notice, Section III, ¶(4).**

➤ Admitted (see Respondent’s Answer to Amended Notice, Page 2, Section III, ¶(4).

5. Pursuant to RSA 149-M:9, III, upon request of DES “the attorney general shall conduct a background investigation of the performance history and criminal record of the applicant and of its officers and directors, if any, and make a report to the department.” DES may also request a background investigation of the applicant in conjunction with an application to transfer a permit. RSA 149-M:9, XII(a). (**Amended Notice, Section III, ¶(5).**

➤ Admitted (see Respondent’s Answer to Amended Notice, Page 2, Section III, ¶(5).

6. Env-Wm 316 specifies which entities and individuals must complete personal history disclosure forms and what information must be provided, and

directs that these forms be submitted directly to the Attorney General's Office ("AGO"), rather than to DES. **(Amended Notice, Section III, ¶6).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 2, Section III, ¶6).

7. Env-Wm 303.14(a) and (b)(1) require an applicant for a solid waste permit to certify that no individual holding 10% or more of the applicant's debt or equity, and none of the applicant's officers, directors, partners or managers, have been convicted of a felony during the 5 years before the date of the application. **(Amended Notice, Section III, ¶7).** Admitted (see Respondent's Answer to Amended Notice).

- Admitted (see Respondent's Answer to Amended Notice Page 3, Section III, ¶7).

8. Env-Wm 316.02(a)(3) specifically requires certification under Env-Wm 303.14 for applications to transfer ownership or operational control of a solid waste facility. By operation of Env-Wm 315.08, which establishes the existing permittee and the proposed permittee as co-applicants for a permit transfer, the certification is required for both the existing permittee and the proposed permittee. **(Amended Notice, Section III, ¶8).** Admitted*.

- Admitted* (see Respondent's Answer to Amended Notice, Page 3, Section III, ¶8)

9. Env-Wm 303.15 provides that applicants unable to certify compliance pursuant to Env-Wm 303.14 must instead submit a compliance report explaining the circumstances which prevent certification and the reason(s) why those circumstances should not be grounds for denying the requested approval. **(Amended Notice, Section III, ¶9).**

- Admitted* (see Respondent's Answer to Amended Notice, Page 3, Section III, ¶9)

10. Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that "[t]here are no circumstances by which the permittee can correct or eliminate the underlying problem" (Amended Notice, Section III, ¶37).

- Admitted (see Respondent's Answer to Amended Notice, Page 14, Section III, ¶37).

11. Env-Wm 306.05 specifies the circumstances which provide "good cause" for revoking a permit. These circumstances include violation of chapter RSA 149-M or the Solid Waste Rules (RSA 149-M:12, III; Env-Wm 306.05(a)), discovery that a permit was issued based on false or misleading information (Env-Wm 306.05(b)), or meeting any other criteria for permit denial (Env-Wm 306.05(c)). (Amended Notice, Section III, ¶38).

- Admitted (see Respondent's Answer to Amended Notice, Page 15, Section III, ¶38).

12. Criteria for permit denial include the applicant's failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility, per RSA 149-M:9, IX(a). (Amended Notice, Section III, ¶39).

- Admitted (see Respondent's Answer to Amended Notice, Page 15, Section III, ¶39).

13. Criteria for permit denial also include conviction of the permittee or one of its officers or directors during the five years prior to the application, per RSA 149-M:9, IX(c). (Amended Notice, Section III, ¶40).

- Admitted* (see Respondent's Answer to Amended Notice, Page 15, Section III, ¶40).

14. Env-Wm 315.02(e)(6) and 315.02(c) require a permittee to obtain a Type III or Type IB Permit Modification for any "change in organizational structure, officers, directors ... or entities holding 10% or more if the permittee's equity or debt."

Applications for such Modifications require compliance certifications. See Env-Wm 303.13(c) (providing that applicants for a Type I permit modification must submit either a compliance certification or a compliance report as specified in Env-Wm 303.14).

- See CFNH's Post-Hearing Memorandum.

15. Env-Wm 315.02(f) and Env-Wm 315.03 require a permittee to obtain a Type IV Permit Modification prior to any "change in the: (1) Operational control of a facility; or (2) Ownership of the facility...."

- See CFNH's Post-Hearing Memorandum.

16. RSA 149-M:9, IX(c) and Env-Wm 306.05 provide an affirmative disclosure obligation on a permittee and grounds for denial or revocation of a solid waste permit even if an officer, director or greater than 10% owner of a company holding the permit is convicted of a felony, even if that convicted person later resigns from the company.

- See CFNH's Post-Hearing Memorandum.

17. RSA 149-M:9, VIII requires the applicant for a solid waste facility permit to notify abutters of the public hearing on the application in writing by certified mail, return receipt requested. (**Amended Notice, Section III, ¶48**).

- Admitted (see Respondent's Answer to Amended Notice, Page 25, Section III, ¶48).

18. Env-Wm 303.05(d) requires that, if the applicant or the owner of the facility site owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant or facility site owner. (Amended Notice, Section III, ¶49).

- Admitted* (see Respondent's Answer to Amended Notice, Page 25, Section III, ¶49).

19. DENIED-Under the circumstances presented here, pursuant to Env-Wm 303.05(d), where the applicant or the owner of the facility site – or their subsidiaries or affiliates – own any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant, facility site owner, or their subsidiaries or affiliates.

- See CFNH's Post-Hearing Memorandum.

ULTIMATE CONCLUSIONS OF FACT AND LAW

1. Based on the findings of fact proposed by the Attorney General's Office, as supplemented here and as established through the evidence presented in the hearing, the 2002 Permit and subsequent Modifications thereto shall be revoked because good cause as provided in Env-Wm 306.05 exists, and there are no circumstances by which the underlying problems can be corrected or eliminated. Good cause exists because:

- a. Issuance of the 2002 Permit and the subsequent Type IV and Type IA Modifications was based on false, misleading and otherwise incomplete information, including but not limited to false compliance certifications and other material false or misleading statements and omissions;
- b. Mr. DiNapoli was convicted of a felony before the 2002 Permit, or any modifications thereto, were approved;

- c. Regenesys and Bio Energy LLC their officials – namely Messrs. DiNapoli, Dell’Orfano, and Smith – violated solid waste laws and regulations in the course of and in connection with the solid waste permit applications;
 - d. DENIED AS TO MESSRS. DELL’ORFANO AND SMITH-Messrs. Dell’Orfano, DiNapoli and Smith lack sufficient reliability, expertise, integrity and competence to operate a solid waste facility; and
 - e. DENIED-The applicant(s) failed to provide notice to abutters as required by the solid waste laws and regulations.
2. DENIED-Alternatively, the 2002 Permit and subsequent Modifications thereto are void ab initio because
- a. The applications for the 2002 Permit and subsequent Type IV and Type IA Modifications contained false or misleading information, including false compliance certifications, and otherwise omitted required information, rendering those applications incomplete such that the DES had no authority to act on them;
 - b. In connection with the various applications and proceedings related to those applications, the applicants defeated the rights of the public, including abutters to the Facility and to properties owned by close affiliates of the applicants, to proper notice and to complete and truthful applications.


E. The Town of Hopkinton’s Requests for Rulings of Law were provided in memorandum form (dated May 20, 2005 and are granted or denied consistent with the conclusions of law in this decision.

V. Decision

On the basis of the Findings of Fact, Analysis and Conclusions of Law stated above, the Permit is hereby revoked.

Pursuant to RSA 21-O:9, V and 21-O:14, any appeal of this decision shall be filed with the Waste Management Council.

Department of Environmental Services

By 
Michael J. Walls, Presiding Officer

Date: June 23, 2005

B

Regenesis Corporation
1994 Maple Street
West Hopkinton, NH 03229

RE: Solid Waste Permit No. DES-SW-SP-02
Bio Energy Solid Waste Facility
West Hopkinton

NOTICE OF PROPOSED LICENSE ACTION
NO. 04-010

MAY 9, 2005

Decision on CFNH's Motion to Reopen Evidentiary Hearing

An evidentiary hearing on the above-captioned matter was held on April 18-20, 2005. The record was held open pending resolution of the Town of Hopkinton's Motion to Compel Respondent Regenesis Corporation to provide certain additional information and documents in response to the Town's information request. The Town's Motion to Compel was denied on April 26, 2005.

On April 21, 2005, Regenesis submitted four additional Exhibits, numbered 61, 62, 63 and 64, accompanied by the affidavit of Linda Sheehy. The Exhibits relate generally to the timing of the State's knowledge of Mr. DiNapoli's felony conviction. On April 22, 2005, the State objected and moved to exclude Respondent's Exhibits 61, 63 and 64. The State contended that submission of the exhibits after the hearing unfairly denied it the opportunity to respond.

On April 26, 2005, Regenesis objected to the State's Motion to Exclude the exhibits, and further moved to reopen the hearing. On May 2, 2005, the State objected to the motion to reopen.

The State's Objection to and Motion to Exclude Respondent's Exhibits 61, 63 and 64 was denied on May 4, 2005. The record was held open until May 11, 2005, to afford the State and the Intervenors an opportunity to respond to or rebut Exhibits 61-64. Motions to reopen the evidentiary hearing were to be filed by May 6, 2005. If so requested, a further evidentiary hearing was tentatively scheduled on May 10, 2005.

CFNH filed a Motion to Reopen Evidentiary Hearing on May 6, 2005 and notified the parties that it intended to call four additional witnesses, including DES Commissioner Michael Nolin, DES Air Resources Division Director Robert Scott, the State's attorney in this proceeding, Senior Assistant Attorney General Jennifer Patterson, and Executive Councilor Peter Spaulding.

On May 9, 2005, the State objected to CFNH's Motion to re-open the hearing. The State argued that the testimony of CFNH's proposed witnesses is not necessary at this late stage of the proceeding in light of the existing record. The State also noted the

practical difficulties posed by CFNH's announced intention to call as a witness the State's attorney of record.

Exhibits 61, 63 and 64 are newspaper articles that contain statements by various people who have played a role in the public discussion surrounding the Bio Energy facility. Exhibit 62 is an Acknowledgment of Receipt for the filing of a standard permit by Bio Energy Corporation dated September 28, 2001. Exhibit 65 is an Affidavit of Linda Sheehy identifying the sources of Exhibits 61-64.

After reviewing Exhibits 61-65 in the context of the overall record generated by three days of hearing, I do not believe that any of the information presented in the exhibits warrants a reopening of the hearing to receive additional testimony. Neither of the parties whose rights, duties or other substantial interests are at stake, the State and Regenesis, has requested that the hearing be re-opened. Although no limits have been placed on the participation of the intervenors in this case, a request to reopen the hearing that is not supported by the parties carrying the burden of proof deserves close scrutiny to protect the rights of the real parties in interest. CFNH's Motion identifies no specific evidentiary basis for taking further testimony related to Exhibits 61-64. Its proposed cross-examination of Commissioner Nolin, Councilor Spaulding, Director Scott and Assistant Attorney General Patterson (all persons known to have been involved in the controversy surrounding the Bio Energy facility well before the hearing on April 18-20, 2005) seems unlikely to lead to anything more than peripherally relevant evidence that will not be material to deciding the issues presented by the Notice of Proposed License Action. Further, absent a patently compelling need to take additional testimony that is lacking here, it will impair the orderly and prompt conduct of this proceeding to reopen the hearing.

CFNH's Motion to Reopen Evidentiary Hearing is denied.

The deadline for filing all further post-hearing pleadings, memoranda and requests for findings of fact and rulings of law is May 20, 2005.

Department of Environmental Services

By:


Michael J. Wells, Presiding Officer

MJW/gcf

cc: Jennifer J. Patterson, Esquire
Edward A. Haffer, Esquire
Robert P. Cheney, Esquire
John-Mark Turner, Esquire

Barry Needleman, Esquire
N. Jonathan Percss, Esquire
Ronald J. Lajoie, Esquire
John E. Friberg, Jr., Esquire
Jeffrey L. Roelofs, Esquire



29 Hazen Drive, PO Box 95
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FAX

Date: May 9, 2005

To: Jennifer J. Patterson, Esq. (603) 223-6267
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N. Jonathan Peress, Esq. (603) 230-4448
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John E. Friberg, Jr., Esq. (866) 947-0921
Jeffrey L. Roelofs, Esq. (617) 252-6899

From: Michael P. Sclafani, Legal Assistant
Office of the Commissioner
(603) 271-6072 voice

Pages: 4 (including cover page)

Subject: Docket No. NPLA 04-010 – Regencsis Corp.

Attached please find the Presiding Officer's decision on *CFNH's Motion to Reopen Evidentiary Hearing*.

Please let me know if you will require an additional printed copy by USPS.

If you have any questions please contact me at (603) 271-6072 or by email at msclafani@des.state.nh.us

C

Regenesis Corporation
1994 Maple Street
West Hopkinton, NH 03229

RE: Solid Waste Permit No. DES-SW-SP-02
Bio Energy Solid Waste Facility
West Hopkinton

NOTICE OF PROPOSED LICENSE ACTION
NO. 04-010

APRIL 26, 2005

**Decision on Town of Hopkinton's Motion to Compel Respondent to Provide
Information and Documents in Response to Town's Information Request**

On April 14, 2005, the Town of Hopkinton (Town) filed the above-referenced Motion to Compel respondent Regenesis Corporation to provide further responses to certain information requests. The Town sought additional information responsive to its Requests 8, 9 and 13 (b). Requests 8 and 9 sought information concerning the involvement Bio Energy LLC and its employees in the operations of the Bio Energy facility. Request 13 (b) sought the "maintenance log" and any other records of maintenance activities undertaken at the Bio-Energy facility since June 12, 2002. On April 15, 2005, Regenesis objected to the Town's Motion to Compel. Regenesis asserted that the Town's motion was untimely under Env-C 204.07(h) because it was filed only four days before the beginning of the hearing, and that, in any event, all of the requested records have been provided in response to other information requests. The Town and Regenesis briefly addressed the Motion to Compel at the beginning of the hearing on the merits on April 18, 2005. CFNH joined in the Town's Motion to Compel.

The Town's First Set of Information Requests, dated March 30, 2005, included 13 separately stated requests for information and documents relating to Regenesis Corporation, Bio Energy LLC and the "Bio Energy facility". Regenesis responded to the Town's Information Request on April 13, 2005. Regenesis stated in its objection that it photocopied over 3,000 pages of documents in response to the Town's information request.

Requests 8 and 9 were phrased so as to elicit admissions by Regenesis that the LLC and its employees were involved in the operation and maintenance of the Bio Energy facility. Not surprisingly, Regenesis responded to both information requests that the LLC and its employees had no involvement with the solid waste activities at the facility other than as required under the operating lease. Regenesis' responses were consistent with the theory of its case, and they were sufficiently responsive to the requests as posed.

Request 13 (a) and (b) sought maintenance records for the Bio Energy facility since June 12, 2002. Regenesis has already provided these records in response to Request 11 (c). See Regenesis' Objection to the Town's Motion to Compel, pages 5-6.

The Town's Motion to Compel is denied.

Department of Environmental Services

By: 
Michael J. Walls, Presiding Officer

MJW/gcf

cc: Jennifer J. Patterson, Esquire
Edward A. Haffer, Esquire
Robert P. Cheney, Esquire
John-Mark Turner, Esquire
Barry Needleman, Esquire
N. Jonathan Peress, Esquire
Ronald J. Lajoie, Esquire
John E. Friberg, Jr., Esquire
Jeffrey L. Roelofs, Esquire

D

Regenesis Corporation
1994 Maple Street
West Hopkinton, NH 03229

RE: Solid Waste Permit No. DES-SW-SP-02
Bio Energy Solid Waste Facility
West Hopkinton

NOTICE OF PROPOSED LICENSE ACTION
NO. 04-010

APRIL 14, 2005

Decision on CFNH's Motion to Compel Respondent to Provide Further Responses to Information Requests

CFNH filed a motion on April 7, 2005, to compel respondent Regenesis Corporation to provide further responses to certain information requests. CFNH sought additional information responsive to Request 5 of its First Set of Requests (concerning Mr. DiNapoli's role in the Bio Energy facility), Request 8 of its First Set of Requests (concerning contracts or agreements among the alleged Bio Energy-related companies), and Request 4 of its Second Set of Information Requests (concerning communications between the alleged Bio Energy-related companies and the Town of Hopkinton). Regenesis filed an objection to CFNH's Motion to Compel on April 12, 2005, and CFNH filed a response to the objection the next day. The parties orally argued the motion at the pre-hearing conference on April 8, 2005.

CFNH's Motion to Compel further responses is denied. Regenesis' Second Supplemental Response provided a sufficiently detailed description of Mr. DiNapoli's role in the ownership and operation of the Bio Energy facility to provide a responsive answer to Request 5. A motion to compel a response to Request 8 was denied in the Decision on Pending Motions dated February 18, 2005, on relevancy grounds. CFNH argued in its Reply to the Objection that a recent Regenesis answer identifying Xgenesis Corporation as Regenesis' agent is sufficient indication that the requested information will be relevant to the pending license action. While such information may be relevant to the context of the proceeding, it is not directly relevant to the allegations in the Notice of Proposed License Action. An evidentiary review of the context of the operations of all of the Bio Energy-related companies is beyond the scope of this proceeding. The documents sought in Request 4 constitute a similarly overbroad inquiry into the general relationships among the Bio Energy-related companies and the Town of Hopkinton.

Department of Environmental Services

By:

COPY
Michael J. Walls
Michael J. Walls, Presiding Officer

MJW/gcf

cc: Jennifer J. Patterson, Esquire
Edward A. Haffer, Esquire
Robert P. Cheney, Esquire
John-Mark Turner, Esquire
Barry Needleman, Esquire
N. Jonathan Peress, Esquire
Ronald J. Lajoie, Esquire
John E. Friberg, Jr., Esquire
Jeffrey L. Roelofs, Esquire

E

Regenesiis Corporation
1994 Maple Street
West Hopkinton, NH 03229

Re: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

NOTICE OF PROPOSED LICENSE ACTION
NO. 04-010

FEBRUARY 17, 2005

DECISION ON PENDING MOTIONS

I. INTRODUCTION

A hearing was held in the above-captioned matter on February 14, 2005, to address the following motions:

1. Pre-Hearing Motion and Memorandum of CFNH Regarding Issues and Scheduling;
2. Residents Environmental Action Committee for Health's ("REACH") Motion to Strike and Preclude Affidavits;
3. Town of Hopkinton's Motion to Strike Certain Affidavits Submitted by Regenesiis Corporation;
4. REACH's Motion to Compel; and
5. Motion of CFNH to Compel Respondent to Provide Responses to Information Requests.

For the reasons explained below, CFNH's Motion to define the issues presented by this proposed license action is granted in part and denied in part. The Motions to Strike Affidavits are granted. REACH's Motion to Compel the depositions of certain individuals is denied and a ruling on its Motion to Compel the disclosure of certain documents is deferred pending a review of the unredacted documents. CFNH's Motion to Compel Respondent to Provide Response to Information Requests is granted in part and denied in part.

II. CFNH'S MOTION TO DEFINE ISSUES

This case was initiated by a Department of Environmental Services ("DES" or "Department") Notice of Proposed License Action ("NPLA" or "Notice") dated November 22, 2004. The Notice announced DES's intent to "revoke Solid Waste Permit No. DES-SW-SP-002 held by Regenesiis Corporation for the Bio Energy Solid Waste Facility in West Hopkinton, NH,

based on the violations alleged below." NPLA, Section I. Following a section that identified the parties, a Summary of Facts and Laws Supporting the Proposed Action was provided. NPLA, Section III. The Summary of Facts contained allegations relating to the original application for a solid waste facility permit by Bio Energy Corporation, a felony conviction of Bio Energy principal Anthony DiNapoli, the subsequent dissolution of Bio Energy Corporation, and a permit transfer to Regensis based on a company certification that none of Bio Energy's officers and directors have been convicted of a felony during the past five years. The Summary of Facts also included allegations concerning issues raised by CFNH in a Superior Court lawsuit relating to the adequacy of notifications to abutters in the December 2002 permit transfer proceeding and a February 2003 permit modification proceeding.

The NPLA thereafter alleged the following violations of the State's solid waste statutes and rules:

1. William Dell'Orfano made a false or misleading statement when he certified on December 2, 2002, that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer.
2. William Dell'Orfano's false or misleading statement to DES in the course of the permit proceedings calls into question whether Regensis has the reliability and integrity to operate a solid waste facility.

NPLA, Section IV.

The NPLA gave notice of the following proposed actions by DES:

1. Under the circumstances, the permittee cannot correct the underlying problem. Therefore, DES proposes to revoke the permit.
2. DES further orders Regensis to show cause why, if the permit is not revoked, the 2003 application for permit modification should not be reopened based on inadequate notice to abutters.

NPLA, Sections IV and V.

The NPLA concluded by notifying Regensis of its right to contest "these allegations" in a formal adjudicative proceeding conducted pursuant to RSA 541-A:31 and Env-C 204. NPLA, Section VI.

In its Motion, CFNH sought to have the following issues (stated in abbreviated fashion) addressed at the hearing:

1. Should the DES revoke Solid Waste Permit No. DES-SW-SP-02-002 ("the permit") because of William Dell'Orfano's (1) false or misleading certification in the Transfer

Application on December 2, 2002 ("2002 Transfer Application"), that none of Bio Energy Corporation's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer...and (2) failure to notify DES that Bio Energy Corporation had been dissolved three months prior to the application?

2. Do other false or misleading statements or omissions in the "course of the permit proceedings" (Notice, ¶ IV.2) demonstrate that Bio Energy, LLC, Regensis and/or their principals lack the "reliability and integrity to operate a solid waste facility".
3. Were the three permit approvals (i.e., the 2002 permit; 2003 transfer and the 2003 modification) void from the beginning as they were deemed denied for failure to submit complete applications?
4. Should "the permit transfer and modification proceedings" for the three permit approvals be reopened because the applicants violated Env-Wm 303.05(d) by failing to notify landowners beyond parcels held in common or related ownership with the facility site?

In its Supplemental Memorandum of CFNH Regarding Motion to Define Issues, CFNH made clear its position that the question presented by issue # 2 concerning Regensis's reliability and integrity required an "evaluation of the context" of all of the Bio Energy/Regensis permit proceedings, and resolution of "all presently known issues of 'integrity and reliability'." Supplemental Memorandum of CFNH Regarding Motion to Define Issues, pages 5 and 6. CFNH thus seeks a broad inquiry at the hearing into matters reflecting on the reliability and integrity of Regensis and its related companies.

Regensis objected, at least in part, to CFNH's characterization of the issues. Regensis agreed, with some minor qualifications, that CFNH's issues # 1 and 4 were presented by the Department's notice of proposed license action. Regensis objected to CFNH's issues # 2 and 3 as beyond the scope of the Department's NPLA, asserting constitutional due process concerns. Respondent's Objection to CFNH's Motion to Define Issues.

DES, through the Attorney General's office, agreed that some form of issues # 1 and 4 fell within the scope of the NPLA. With respect to issue # 2, the Department agreed with CFNH that adjudication of the NPLA required a broad inquiry into whether "the applicant was not truthful, or withheld information in a misleading fashion, not only about the criminal conviction, but also about the identity of its principals, the legal status of corporate entities, or private transactions affecting the permit." State's Response to CFNH's Motion to Define Issues, paragraph 4. With respect to issue # 3, concerning whether the permits were void *ab initio*, the Department did not object to legal argument on the issue, as long as it was not used as the basis for bringing in additional evidence.

As the holder of a governmental permit, Regensis is entitled to due process of law before that permit may be revoked. It is black letter law that due process requires notice reasonably

calculated to inform affected parties of the proposed governmental action and an opportunity for objection. A notification must also give a reasonably complete statement of the information upon which the proposed action is based. See, e.g., *Petition of Bagley*, 128 N.H. 275 (1986). Consequently, due process principles bar an agency from revoking a permit on grounds not stated in its notice to the affected parties.

The scope of the hearing to be conducted in this matter is bounded both by the Department's obligation to conduct a fair hearing and the factual and legal assertions made in the NPLA. Contrary to the positions taken by CFNH and the Department, the NPLA does not contain factual or legal allegations that support an open-ended evidentiary inquiry into Regenesys's general reliability and integrity to operate a solid waste facility. The NPLA alleges a sequence of facts relating to the permit issued to Bio Energy, the criminal conviction of Mr. DiNapoli, the transfer of the permit to Regenesys and the accuracy of Mr. Dell'Orfano's certification that no company official had a felony conviction. Additional facts are alleged relating to the dissolution of the corporation and the adequacy of certain notices to abutters in the 2002 transfer and 2003 modification proceeding. Two specific violations were alleged as arising out of the NPLA's factual and legal recitation, and two alternative forms of relief were sought.

The evidence and issues at the hearing will be limited to that which is relevant and material to the facts summarized in Section III of the NPLA, and to the violations and proposed actions described in Sections IV and V. See Env-C 204-16(a). Evidence relating to allegedly false or misleading statements, or other corporate behavior not reasonably related to allegations in the NPLA will not be considered. REACH's Motion is denied with respect to Issue #2.

REACH's Motion is partially granted with respect to its proposed Issues #1, 3 and 4 through a slightly different reformulation of the issues. As guidance to the parties, the decision in this case will address the following legal issues:

1. Whether William Dell'Orfano made a false or misleading statement when he certified in December of 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for a permit transfer.
2. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the failure to disclose a felony conviction of a corporate principal.
3. Whether Mr. Dell'Orfano provided misleading or incomplete information to DES by failing to disclose that Bio Energy Corporation had been dissolved in the 2002 transfer application.
4. Whether good cause exists as provided in Env-Wm 306.05, to revoke the permit based on the failure to disclose the dissolution of Bio Energy Corporation.

5. Whether the alleged failures to disclose the felony conviction or the dissolution of Regenesiis Corporation demonstrate that Regenesiis Corporation lacks the reliability and integrity to operate a solid waste facility.
6. Whether good cause exists as provided in Env-Wm 306.05 to revoke the permit based on the permittee's lack of reliability and integrity.
7. Whether the required notices to abutters in the 2002 transfer proceeding and the 2003 permit modification proceeding complied with Env-Wm 303.05 (d), and, if not, whether either of these prior proceedings should be reopened.

The parties and intervenors may present legal arguments on whether the facts and evidence support a finding that the permit was void *ab initio*. CFNH's Motion to Define Issues is granted in part, and denied in part, consistent with this decision.

III. MOTIONS TO STRIKE AFFIDAVITS

REACH filed a Motion to Strike and Preclude Affidavits that is essentially a motion *in limine* to prevent the introduction into evidence at the hearing of affidavits by Mr. DiNapoli, Dorothy Sajous, Attorney Peter Caruso, and accountant Antonio Valella. REACH also requested an order compelling the attendance of the proposed affiants at the hearing or the issuance of administrative subpoenas to compel their attendance. REACH further suggested that a negative inference be drawn by the presiding officer from Regenesiis' unwillingness to call the proposed affiants to testify at the hearing. REACH contended that the proposed affiants are central to the issues of the case and that the use of paper affidavits instead of live witnesses would not allow for a "full and equitable examination of the issues before the Department." REACH Motion to Strike and Preclude Affidavits, paragraph 4. Citing Barrows v. Boles, 141 N.H. 382 (1996), REACH also contended that an affidavit is not admissible because it provides no opportunity for cross examination of the affiant.

CFNH joined in REACH's Motion to Strike and Preclude Affidavits. The Department filed a response to Regenesiis' Motion to Strike and Preclude affidavits that supported REACH's positions. The Town of Hopkinton filed a separate Motion to Strike Certain Affidavits Submitted by Regenesiis Corporation, citing both RSA 541-A:33 and Env-C 204.25 as authority for the right of opposing parties to cross-examine witnesses at an administrative hearing.

Regenesiis filed Opposition to the motions to strike filed by both REACH and the Town of Hopkinton. Regenesiis contended that the use of affidavits should be permitted because the rules of evidence are not strictly applied in adjudicative proceedings, and the allowance of hearsay evidence is within the discretion of the hearing officer. See RSA 541-A:33, II and Asmussen v. Commissioner, NH Department of Safety, 145 N.H. 578 (2000). Regenesiis also pointed to Env-C 204.16(a) which provides that "evidence which is relevant and material to the subject matter of the hearing shall be admissible." REACH also cited Env-C 203.02(c) as

mandating that "the presiding officer shall ... receive relevant exhibits." From these rules, Regensis argued that a presiding officer has no discretion to exclude relevant affidavits.

RSA 541-A:33 I provides, in part:

I. All testimony of parties and witnesses shall be made under oath or affirmation administered by the presiding officer.

II. The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidence offered may be made and shall be noted in the record. Subject to the foregoing requirements, any part of the evidence may be received in written form if the interests of the parties will not thereby be prejudiced substantially.

...

IV. A party may conduct cross-examinations required for a full and true disclosure of the facts.

RSA 541-A:33, I, II and IV

Env-C 204.14 provides, in part:

a) All testimony shall be offered in accordance with RSA 541-A:33, I.

...

d) Any person ... who wishes to submit written testimony at the hearing in addition to oral testimony shall do so to the presiding officer, provided the person signs and dates such testimony and the presiding officer determines, as required by RSA 541-A:33 II, that the interests of the other parties will not thereby be prejudiced substantially. The person submitting written testimony shall give a copy of such testimony to each party. All parties shall have the opportunity to cross examine the witness and offer rebuttal testimony to the testimony.

e) Any person offering testimony shall be subject to cross examination....

Env-C 204.14

Administrative hearings are conducted in a less formal manner than Superior Court trials, but they are governed by the provisions of RSA Chapter 541-A and the agency's administrative

rules. Consistent with applicable statutes and rules, hearings must be conducted in a manner that does not substantially prejudice the interests of the parties and that result in a full and true disclosure of the material facts. RSA 541-A:33 and Env-C 204.14 ensure a fair and level administrative playing field by requiring that witness testimony be under oath and be subject to cross-examination.

The Department's rules make no specific provision for the submission of affidavits at administrative hearings. Env-C 204-14 (d) does authorize the submission of pre-filed written testimony where the interests of the other parties will not be substantially prejudiced and they have the opportunity to cross examine the witness. This rule suggests the importance that DES administrative hearing procedures attach to the right of cross-examination in the context of hearsay testimony.

Hearsay affidavits are sometimes admitted at an administrative hearing when there is no objection by other parties. However, the use of affidavits in lieu of live testimony, over the objections of opposing parties, generally prejudices the interests of those parties because they cannot subject the affiants to cross examination at the hearing.

In this case, the use of the proposed Regenesis affidavits would substantially prejudice the rights of the Department and the other parties. Basic tenets of procedural fairness require that a party's right to cross examine a witness outweigh another party's right to submit an out-of-court statement such as an affidavit. Accordingly, the Motions to Strike and Preclude Affidavits are granted with respect to the use of affidavits.

REACH's request for an order compelling the attendance of witnesses at the hearing, or the issuance of administrative subpoenas is denied. The Department does not have general authority to issue subpoenas. It has specific authority to issue subpoenas in certain arenas, such as air and water pollution control. See, e.g., RSA 125-C:4, II and RSA 485-A:20. With respect to solid waste management issues, the Attorney General has subpoena power, but DES does not. See RSA 149-M:13.

REACH's request that a negative inference be drawn from Regenesis's alleged reluctance to call certain witnesses is denied without prejudice. After the evidence is received at the hearing, all parties will have the opportunity to state their positions and to suggest the inferences and conclusions to be drawn.

IV. REACH'S MOTION TO COMPEL

REACH filed a Motion to Compel the depositions of Messrs. Dell'Orfano, DiNapoli and Smith and any witnesses Regenesis Corporation intends to produce by way of affidavit. REACH cited the following statement from the Wicbusch treatise on New Hampshire Civil Practice as the principal authority for its request:

A party has all the rights of pre-trial discovery before agency hearings that the party enjoys in the Superior Court.

New Hampshire Practice, Volume V, *Civil Practice and Procedure*, Section 64:16.

Regenesis objected to REACH's Motion to Compel, arguing that there is no statutory or regulatory authority for an agency to require depositions in an administrative case. At the hearing on February 14, 2005, Regenesis argued that the above-quoted statement in the Wiebusch treatise was "simply wrong." Regenesis also cited the Supreme Court's admonition in Appeal of Portsmouth Savings Bank, 123 N.H. 1 (1983) against turning administrative hearings into "mini trials."

REACH's Motion to Compel the depositions is denied. In the absence of a statute or a rule authorizing depositions in a DES administrative proceeding, the Wiebusch citation is neither authoritative nor persuasive. DES is not legally authorized, in either RSA Chapter 541-A or any other statute, to require parties in an adjudicative hearing to participate in depositions. Env-C 204.07 does require the pre-hearing exchange of written information directly related to the matter at issue. The parties are also free to conduct discovery depositions by agreement.

A decision on that portion of REACH's Motion to Compel relating to the disclosure of certain unredacted documents will be deferred until they can be reviewed by the pre-officer.

V. MOTION OF CFNH TO COMPEL RESPONDENT TO PROVIDE RE TO INFORMATION REQUESTS

CFNH moved to compel additional responses by Regenesis to certain information requests propounded pursuant to Env-C 204.07. Regenesis objected. CFNH's dissatisfaction with Regenesis' responses is, in large measure, grounded in its presumption that issues concerning the general reliability and integrity of the permittee, would be considered at the hearing. As that will not be the case (see Section II, supra), the numbered requests 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are denied, because they request information that is not directly related to the factual and legal issues raised in the NPLA.

Request #5 is granted, because it requests information concerning Mr. DiNapoli that is directly relevant to the factual and legal issues raised in the NPLA. Requests #6 and 7, which request information concerning the dissolution of Bio Energy Corporation and the disposition of its assets, are granted because the information requested is directly relevant to factual and legal issues raised in the NPLA.

Request #12, concerning abutter notifications regarding any solid waste permit or modification for the Bio Energy Solid Waste Facility, is also granted. Information concerning the notifications to abutters in the original permit proceeding is directly relevant to factual or legal issues raised in the NPLA. The type of abutter notifications provided by the applicant

company in the original permit proceeding is directly relevant to the adequacy of the abutter notifications provided by the permittee companies in the transfer and modification proceedings.

Department of Environmental Services

COPY
By: 
Michael J. Walls, Presiding Officer

cc: Jennifer J. Patterson, Esquire
Edward A. Haffer, Esquire
Robert P. Cheney, Esquire
John-Mark Turner, Esquire
Barry Needleman, Esquire
N. Jonathan Peress, Esquire
Ronald J. Lajoie, Esquire
John E. Friberg, Jr., Esquire
Jeffrey L. Roclofs, Esquire

F



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Regenesi Corporation
1994 Maple Street
West Hopkinton, NH 03229

Re: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

**AMENDED
NOTICE OF PROPOSED
LICENSE ACTION**

No. 04-010

MARCH 4, 2005

I. INTRODUCTION

This Amended Notice of Proposed License Action is issued by the Department of Environmental Services, Waste Management Division ("DES") to Regenesi Corporation, pursuant to RSA 541-A:30, II and Env-Wm 306.03. DES is proposing to revoke Solid Waste Permit No. DES-SW-SP-002 held by Regenesi Corporation for the Bio Energy Solid Waste Facility in West Hopkinton, NH based on the violations alleged below. This notice amends the original notice issued in this action on November 22, 2004. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Waste Management Division is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Regenesi Corporation ("Regenesi") is a corporation registered to do business in New Hampshire having a mailing address of 1994 Maple Street, West Hopkinton, NH 03229.

III. SUMMARY OF FACTS AND LAW SUPPORTING PROPOSED ACTION

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted NH CODE ADMIN. RULES Env-Wm 100 – 300, 2100 *et seq.* ("Solid Waste Rules") to implement this program.
2. Pursuant to RSA 149-M:9, any person who wishes to construct, operate, or initiate closure of a public or private solid waste facility must first obtain a permit from DES. Under RSA 149-M:9, XII, no solid waste permit may be transferred to any other person without prior written approval of DES.
3. Under RSA 149-M:9, IX(a), DES may deny a solid waste permit application if the applicant "fails to demonstrate sufficient reliability, expertise, integrity, and competence to

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operate a solid waste facility.”

4. Under RSA 149-M:9, IX(c), DES may deny a solid waste permit application “[i]n the case of a corporation or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of ... a felony in any state or federal court during the 5 years before the date of the permit application.”
5. Pursuant to RSA 149-M:9, III, upon request of DES “the attorney general shall conduct a background investigation of the performance history and criminal record of the applicant and of its officers and directors, if any, and make a report to the department.” DES may also request a background investigation of the applicant in conjunction with an application to transfer a permit. RSA 149-M:9, XII(a).
6. Env-Wm 316 specifies which entities and individuals must complete personal history disclosure forms and what information must be provided, and directs that these forms be submitted directly to the Attorney General’s Office (“AGO”), rather than to DES.
7. Env-Wm 303.14(a) and (b)(1) require an applicant for a solid waste permit to certify that no individual holding 10% or more of the applicant’s debt or equity, and none of the applicant’s officers, directors, partners or managers, have been convicted of a felony during the 5 years before the date of the application.
8. Env-Wm 316.02(a)(3) specifically requires certification under Env-Wm 303.14 for applications to transfer ownership or operational control of a solid waste facility. By operation of Env-Wm 315.08, which establishes the existing permittee and the proposed permittee as co-applicants for a permit transfer, the certification is required for both the existing permittee and the proposed permittee.
9. Env-Wm 303.15 provides that applicants unable to certify compliance pursuant to Env-Wm 303.14 must instead submit a compliance report explaining the circumstances which prevent certification and the reason(s) why those circumstances should not be grounds for denying the requested approval.
10. On October 9, 2001, Bio Energy Corporation (“Bio Energy”) submitted an application for a solid waste facility permit for a facility located at 2003 Maple Street in West Hopkinton, N.H. (“Bio Energy Facility”).
11. On October 16, 2001, Anthony DiNapoli, also known as Antonio DiNapoli, submitted a Personal History Disclosure Form to the AGO in connection with Bio Energy Corporation’s application.
12. Mr. DiNapoli’s responses on the form included a sworn statement that he had no criminal convictions (motor vehicle offenses excepted).
13. On October 18, 2001, Mr. DiNapoli was indicted in Hillsborough County Superior Court for witness tampering, a felony.
14. On November 5, 2001, the AGO performed a criminal record check on Mr. DiNapoli. The

search revealed nothing inconsistent with Mr. DiNapoli's response on the form. There was no indication of the recently filed charges.

15. On January 28, 2002, while the solid waste facility application was pending, the Directors of Bio Energy unanimously approved a plan of liquidation for the company, which stated an effective dissolution date of August 31, 2002.

16. In response to an inquiry from the AGO in early March of 2002, prompted by a March 7, 2002 newspaper article indicating that the Bio Energy facility was closing, Bio Energy confirmed that the article was accurate but stated that the company wished to go forward with the solid waste permit application process and intended eventually to transfer the solid waste permit to another company.

17. On March 20, 2002, the AGO conveyed the results of its Bio Energy background investigation to DES.

18. On March 25, 2002, Mr. DiNapoli was convicted in Hillsborough County Superior Court of witness tampering, a felony. The conviction was affirmed by the New Hampshire Supreme Court in State v. DiNapoli, 149 N.H. 514 (2003).

19. On May 28, 2002, DES issued Solid Waste Permit No. DES-SW-SP-002 ("the Permit") to Bio Energy, without knowledge of Mr. DiNapoli's felony conviction.

20. On June 12, 2002, Bio Energy executed a Purchase and Sale Agreement conveying the Bio Energy Facility, including the buildings, the underlying property, most of the facility's equipment and machinery, and "to the extent transferable, all permits, licenses, authorizations and approvals issued or granted to Seller by any governmental agency . . ." to a new entity, Bio Energy, LLC. The Permit was specifically listed as one of the transferred assets. The agreement was executed on behalf of both buyer and seller by William Dell'Orfano. Mr. Dell'Orfano was listed as President of Bio Energy Corporation, and Manager of Bio Energy, LLC.

21. In mid-June of 2002 both Mr. Dell'Orfano and Bio Energy/Regenesis official Harry Smith urged Mr. DiNapoli to resign from Bio Energy Corporation due to concerns about how the felony conviction might impact the company's solid waste facility Permit.

22. Mr. DiNapoli did not resign from Bio Energy, LLC. From at least August 30, 2002 to the present, Mr. DiNapoli has been a member and a creditor of Bio Energy, LLC. From July 29, 2003 to the present, Mr. DiNapoli has also been a managing member of Bio Energy, LLC.

23. On or about July 1, 2002, Bio Energy submitted a request to the Air Resources Division ("ARD") of DES to transfer the Title V air permit from Bio Energy Corporation to Bio Energy, LLC. Under the applicable administrative rules, a change in ownership for purposes of a Title V permit is considered an Administrative Permit Amendment, and does not require a background investigation.

24. On August 30, 2002, Bio Energy Corporation filed Articles of Dissolution with the New Hampshire Secretary of State.

25. During the fall of 2002, Bio Energy asked DES to transfer its Hazardous Waste

Identification Number, its registration for four aboveground storage tanks, and its certification of waste-derived product from Bio Energy Corporation to Bio Energy, LLC. None of the programs notified of the change required a background investigation in conjunction with a change of ownership. In correspondence associated with the name change, Bio Energy indicated that “[e]ffective September 1, 2002 all of the assets owned by Bio Energy Corporation were transferred to Bio Energy LLC.” However, Bio Energy did not apply to the DES solid waste program for permission to transfer the solid waste Permit to Bio Energy, LLC.

26. Bio Energy had originally applied for a solid waste permit in 2001 because it proposed to burn waste wood material classified as solid waste, which made the operation an incineration facility under the solid waste rules. The company did not propose to process wood material into wood fuel chips at the Bio Energy facility, and no permit was issued for that activity.

27. According to the facility’s Title V air permit issued by the ARD, the “significant activities” at the facility consist of operation of a wood-fired boiler and circulation water cooling tower.

28. As a practical matter, the activity allowed under the solid waste permit was the same as the activity allowed under the air permit: burning fuel generated from waste wood material to create electricity.

29. On December 2, 2002, Bio Energy Corporation, Bio Energy, LLC and Regensis Corporation filed with DES an application to transfer the Permit to Regensis (“the Transfer Application”). All three corporations gave the same mailing address of 1994 Maple Street, West Hopkinton, NH 03229, and the check that accompanied the application was from a Bio Energy, LLC account. Corporate officials represented to DES and the AGO that the four individuals who would be required to complete Personal History Disclosure Forms had already completed the forms in connection with the Bio Energy background investigation. With the exception of Mr. DiNapoli, the officers and directors of Regensis Corporation were the same as the officers and directors of Bio Energy.

30. On the Transfer Application, William Dell’Orfano signed, on behalf of both the existing permittee and the proposed permittee, the certification required under Env-Wm 303.14. Specifically, this included a certification that none of Bio Energy’s officers or directors had been convicted of a felony during the five years before the date of the application. None of the statements on either certification were circled as untrue, and no Compliance Reports or explanations were attached.

31. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy inform the DES solid waste program that the company had been dissolved.

32. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regensis inform the DES solid waste program of the purported transfer of the Permit to Bio Energy, LLC.

33. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regensis inform the DES solid waste program that other environmental permits associated with the facility were held not by Regensis but by Bio Energy, LLC.

34. Nowhere on the Transfer Application, and at no point during that application process, did

Bio Energy or Regenesiis inform the DES solid waste program that Mr. DiNapoli had been convicted of a felony, that he had resigned from any company, or that there were any concerns about his continued involvement with the facility.

35. During the Transfer Application process, Regenesiis corporate officials led the DES solid waste program to believe that Mr. DiNapoli was in the process of divesting himself from involvement with the Bio Energy facility. They did not inform the program when Mr. DiNapoli later became a managing member of Bio Energy, LLC.

36. On the Transfer Application, Mr. Dell'Orfano signed the following statement on behalf of both the existing permittee (Bio Energy Corporation) and the proposed new permittee (Regenesiis): "To the best of my knowledge and belief, the information and material submitted herewith is correct and complete. I understand that any approval granted by DES based on false and/or incomplete information shall be subject to revocation or suspension, and that administrative, civil or criminal penalties may also apply."

37. Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that "[t]here are no circumstances by which the permittee can correct or eliminate the underlying problem"

38. Env-Wm 306.05 specifies the circumstances which provide "good cause" for revoking a permit. These circumstances include violation of chapter RSA 149-M or the Solid Waste Rules (RSA 149-M:12, III; Env-Wm 306.05(a)), discovery that a permit was issued based on false or misleading information (Env-Wm 306.05(b)), or meeting any other criteria for permit denial (Env-Wm 306.05(c)).

39. Criteria for permit denial include the applicant's failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility, per RSA 149-M:9, IX(a).

40. Criteria for permit denial also include conviction of the permittee or one of its officers or directors during the five years prior to the application, per RSA 149-M:9, IX(c).

41. Because Mr. DiNapoli was an officer or director of Bio Energy when he was convicted of felony witness tampering on March 25, 2002, Mr. Dell'Orfano made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer.

42. In an effort to avoid disclosure of Mr. DiNapoli's felony conviction, Bio Energy/Regenesiis officials applied to transfer the Permit to an entity with which Mr. DiNapoli was not involved, did not inform the agency that Mr. DiNapoli had resigned or that they had concerns about his fitness to participate in management of the company, and misled DES staff about Mr. DiNapoli's ongoing involvement with the facility. These representations and omissions were false or misleading.

43. Even if Regenesiis can show that Mr. DiNapoli resigned from Bio Energy Corporation prior to Mr. Dell'Orfano's certification, it was misleading for the company not to disclose the conviction in connection with the Transfer Application. Mr. DiNapoli continued to be involved with the facility through Bio Energy, LLC, to a degree that would have necessitated disclosure

had the Permit been transferred to that entity. As a practical matter, a person could not be involved in the "facility" for purposes of the air permit without also being involved in the "facility" for purposes of the solid waste permit.

44. Further, it was misleading for Regenesis not to inform DES that the company holding the Permit had been dissolved three months prior to the application, that the Permit had purportedly been conveyed without DES approval to Bio Energy LLC in June of 2002, and that other environmental permits for operation of the same facility as the solid waste Permit were held by a different entity.

45. The solid waste rules and transfer application form provide an avenue for disclosing information such as environmental violations and criminal convictions, through submission of a Compliance Report. It was reasonable for the DES solid waste program to expect that an applicant with concerns about disqualifying information would bring it to the agency's attention through such a report, as requested on the form.

46. In making its decision to transfer the Permit, the DES solid waste program reasonably relied upon the false or misleading information supplied by Regenesis officials. Because of this reliance, the DES solid waste program did not ask the AGO to investigate Mr. DiNapoli's background again in conjunction with the Transfer Application. As a result, the agency continued to be unaware of Mr. DiNapoli's felony conviction, and had no reason to believe there was any significance to the fact that he was involved with Bio Energy LLC but not with Regenesis.

47. The fact that Regenesis officials supplied DES with false or misleading information, as alleged more specifically in paragraphs 1-46 above, calls into question whether the company has sufficient reliability and integrity to operate a solid waste facility.

48. RSA 149-M:9, VIII requires the applicant for a solid waste facility permit to notify abutters of the public hearing on the application in writing by certified mail, return receipt requested.

49. Env-Wm 303.05(d) requires that, if the applicant or the owner of the facility site owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant or facility site owner.

50. In a petition filed in the matter of Citizens for a Future New Hampshire v. Bio Energy, LLC, et al. (Merrimack County Superior Court No. 04-E-387), a citizens group ("CFNH") whose members allegedly include property owners near the Bio Energy Facility alleges that Bio Energy did not comply with Env-Wm 303.05(d).

51. CFNH alleges that certain companies owning property abutting the Bio Energy facility are under the same or related ownership as Bio Energy, and that the owners of property beyond those parcels should have received notice as abutters. Specifically, CFNH alleges that Bedford Corp., which owned two parcels abutting the Bio Energy parcels in December 2002 when Bio Energy applied to transfer the permit to Regenesis and in February 2003 when Regenesis applied to modify the permit, is affiliated with and receives mail at the same address as Bio Energy and Regenesis. CFNH further alleges that certain residential property owners who own property abutting the Bedford Corp. parcels should have received notice of those applications under Env-Wm 303.05(d).

52. By statute, DES is charged with conducting fair and procedurally proper permit proceedings. Accordingly, CFNH's allegations are of concern to the agency. If true (and the agency by referencing them makes no admission or acknowledgment of their truth or falsity), the allegations could be grounds for reopening the permit transfer and modification proceedings, independent of the possible grounds for revocation described elsewhere in this notice.

53. Therefore, DES orders that, should Regenesis choose to contest the proposed revocation, the company also show cause why the original abutter notification was legally sufficient, and if not, why the applications should not be reopened to provide proper notice.

IV. VIOLATIONS ALLEGED

1. William Dell'Orfano made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer.
2. Regenesis officials' false or misleading statements and omissions to DES in the course of the permit proceedings call into question whether Regenesis has the reliability and integrity to operate a solid waste facility.

V. PROPOSED ACTION

1. Under the circumstances, the permittee cannot correct the underlying problem. Therefore, DES proposes to revoke the Permit.
2. DES further orders Regenesis to show cause why, if the permit is not revoked, the 2003 application for permit modification should not be reopened based on inadequate notice to abutters.

VI. HEARING

Regenesis has the right to a hearing to contest these allegations before the proposed license action is taken. A hearing on this matter has been scheduled for April 18, 19, and 20, 2005 beginning at 9:30 a.m. in **Room C-112/113** of the DES offices at 29 Hazen Drive, Concord, N.H. This hearing shall also serve as the opportunity for Regenesis to show cause as provided in paragraph V.2, above.

This hearing will be a formal adjudicative proceeding conducted pursuant to RSA 541-A:31 and Env-C 204. At the hearing, Regenesis and any witnesses Regenesis may call will have the opportunity to present testimony and evidence as to why the proposed action should not be taken. All testimony at the hearing will be under oath and will be subject to cross-examination.

RSA 541-A:31, III(e) provides that Regenesis has the right to have an attorney present to represent Regenesis at its own expense. Copies of this amended notice are being sent to the company's attorneys, as well as to the attorneys for all intervenors in this ongoing proceeding.

Pursuant to Env-Wm 306.03(c)(2)b., if Regenesis fails to appear at the hearing, the revocation will become effective as of the date of the hearing.

Anyone having questions regarding this matter should contact Senior Assistant Attorney General Jennifer J. Patterson at 271- 3679.

COPY
Anthony P. Giunta, P.G., Director
Waste Management Division

Certified Mail #7000 1670 0000 0586 9700

cc: Board of Selectmen, Town of Hopkinton
Hopkinton-Webster Solid Waste District
Robert P. Cheney, Esq.
Jennifer Patterson, Senior Assistant Attorney General
Michael P. Nolin, Commissioner
Gretchen Hamel, Legal Unit Administrator
Mike Guilfooy, WMD
Edward A. Haffner, Esquire
John-Mark Turner, Esquire
John E. Friberg, Jr., Esquire
Ronald J. Lajoie, Esquire
Barry Needleman, Esquire
N. Jonathan Peress, Esquire
~~Jeffrey L. Roelofs, Esquire~~

G

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NHDES WASTE MGMT DIV

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The State of New Hampshire
Department of Environmental Services

Michael P. Nolin
Commissioner



Regensis Corporation
1994 Maple Street
West Hopkinton, NH 03229

Re: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

**NOTICE OF PROPOSED
LICENSE ACTION
No. 04-010**

November 22, 2004

I. INTRODUCTION

This Notice of Proposed License Action is issued by the Department of Environmental Services, Waste Management Division ("DES") to Regensis Corporation, pursuant to RSA 541-A:30, II and Env-Wm 306.03. DES is proposing to revoke Solid Waste Permit No. DES-SW-SP-002 held by Regensis Corporation for the Bio Energy Solid Waste Facility in West Hopkinton, NH based on the violations alleged below. This notice contains important procedural information. Please read the entire notice carefully.

II. PARTIES

1. The Department of Environmental Services, Waste Management Division is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Regensis Corporation ("Regensis") is a corporation registered to do business in New Hampshire having a mailing address of 1994 Maple Street, West Hopkinton, NH 03229.

III. SUMMARY OF FACTS AND LAW SUPPORTING PROPOSED ACTION

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted NH CODE ADMIN. RULES Env-Wm 100 - 300, 2100 et seq. ("Solid Waste Rules") to implement this program.
2. Pursuant to RSA 149-M:9, any person who wishes to construct, operate, or initiate closure of a public or private solid waste facility must first obtain a permit from DES.
3. Under RSA 149-M:9, IX(a), DES may deny a solid waste permit application if the applicant "fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility."
4. Under RSA 149-M:9, IX(c), DES may deny a solid waste permit application "[i]n the case of a corporation or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of ... a felony in any state or federal court during the 5 years before the date of the permit application."
5. Pursuant to RSA 149-M:9, III, upon request of DES "the attorney general shall conduct a background investigation of the performance history and criminal record of the applicant and of its

P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095
Telephone: (603) 271-3644 • Fax: (603) 271-2181 • TDD Access: Relay NH 1-800-735-2964

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Notice of Proposed License Action No. 04-010

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officers and directors, if any, and make a report to the department."

6. Env-Wm 316 specifies which entities and individuals must complete personal history disclosure forms and what information must be provided, and directs that these forms be submitted directly to the Attorney General's Office ("AGO"), rather than to DES.

7. Env-Wm 303.14(a) and (b)(1) require an applicant for a solid waste permit to certify that no individual holding 10% or more of the applicant's debt or equity, and none of the applicant's officers, directors, partners or managers, have been convicted of a felony during the 5 years before the date of the application.

8. Env-Wm 316.02(a)(3) specifically requires certification under Env-Wm 303.14 for applications to transfer ownership or operational control of a solid waste facility. By operation of Env-Wm 315.03, which establishes the existing permittee and the proposed permittee as co-applicants for a permit transfer, the certification is required for both the existing permittee and the proposed permittee.

9. Env-Wm 303.15 provides that applicants unable to certify compliance pursuant to Env-Wm 303.14 must instead submit a compliance report explaining the circumstances which prevent certification and the reason(s) why those circumstances should not be grounds for denying the requested approval.

10. On October 9, 2001, Bio Energy Corporation submitted an application for a solid waste facility permit for a facility located at 2003 Maple Street in West Hopkinton, N.H. ("Bio Energy Facility").

11. On October 16, 2001, Anthony DiNapoli, also known as Antonio DiNapoli, submitted a Personal History Disclosure Form to the AGO in connection with Bio Energy Corporation's application.

12. Mr. DiNapoli's responses on the form included a sworn statement that he had no criminal record.

13. On October 18, 2001, Mr. DiNapoli was indicted in Hillsborough County Superior Court for witness tampering, a felony. Mr. DiNapoli entered a plea of Not Guilty on November 2, 2001.

14. On November 5, 2001, the AGO performed a criminal record check on Mr. DiNapoli. The search revealed no criminal record, and there was no indication of the recently filed charges. On March 20, 2002, the AGO conveyed the results of the Bio Energy background investigation to DES.

15. On March 25, 2002, Mr. DiNapoli was convicted in Hillsborough County Superior Court of witness tampering, a felony. The conviction was affirmed by the New Hampshire Supreme Court in State v. DiNapoli, 149 N.H. 514 (2003).

16. On May 28, 2002, DES issued Solid Waste Permit No. DES-SW-SP-002 ("the Permit") to Bio Energy, without knowledge of Mr. DiNapoli's felony conviction.

17. On August 30, 2002, Bio Energy Corporation filed Articles of Dissolution with the New Hampshire Secretary of State. Bio Energy did not inform DES of the dissolution.

18. On December 2, 2002, Bio Energy Corporation filed with DES an application to transfer the Permit to Regeneasis ("the Transfer Application"). Both corporations gave the same mailing address of 1994 Maple Street, West Hopkinton, NH 03229. With the exception of Mr. DiNapoli, the officers and directors of Regeneasis Corporation were the same as the officers and directors of Bio Energy.

19. On the Transfer Application, William Dell'Orfano signed, on behalf of both the existing permittee and the proposed permittee, the certification required under Env-Wm 303.14. Specifically, this included a certification that none of Bio Energy's officers or directors had been convicted of a felony during the five

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Notice of Proposed License Action No. 04-010

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years before the date of the application. None of the statements on either certification were circled as untrue, and no Compliance Reports or explanations were attached.

20. Nowhere on the transfer application did Bio Energy inform DES that the company had been dissolved.

21. On the transfer application, Mr. Dell'Orfano signed the following statement on behalf of both the existing permittee and the proposed new permittee: "To the best of my knowledge and belief, the information and material submitted herewith is correct and complete. I understand that any approval granted by DES based on false and/or incomplete information shall be subject to revocation or suspension, and that administrative, civil or criminal penalties may also apply."

22. Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that "[t]here are no circumstances by which the permittee can correct or eliminate the underlying problem"

23. Env-Wm 306.05 specifies the circumstances which provide "good cause" for revoking a permit. These circumstances include violation of chapter RSA 149-M or the Solid Waste Rules (RSA 149-M:12, III; Env-Wm 306.05(a)), discovery that a permit was issued based on false or misleading information (Env-Wm 306.05(b)), or meeting any other criteria for permit denial (Env-Wm 306.05(c)).

24. Criteria for permit denial include the applicant's failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility, per RSA 149-M:9, IX(a).

25. Criteria for permit denial also include conviction of the permittee or one of its officers or directors during the five years prior to the application, per RSA 149-M:9, IX(c).

26. Because Mr. DiNapoli was an officer or director of Bio Energy when he was convicted of felony witness tampering on March 25, 2002, Mr. Dell'Orfano made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer. Further, it was misleading not to inform DES that the company holding the permit had been dissolved three months prior to the application.

27. DES's decision to transfer the permit was based on false or misleading information.

28. RSA 149-M:9, VIII requires the applicant for a solid waste facility permit to notify abutters of the public hearing on the application in writing by certified mail, return receipt requested.

29. Env-Wm 303.05(d) requires that, if the applicant or the owner of the facility site owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant or facility site owner.

30. In a petition filed in the matter of Citizens for a Future New Hampshire v. Bio Energy, LLC, et al (Merrimack County Superior Court No. 04-E-387), a citizens group ("CFNH") whose members allegedly include property owners near the Bio Energy Facility alleges that Bio Energy did not comply with Env-Wm 303.05(d).

31. CFNH alleges that certain companies owning property abutting the Bio Energy facility are under the same or related ownership as Bio Energy, and that the owners of property beyond those parcels should have received notice as abutters. Specifically, CFNH alleges that Bedford Corp., which owned two parcels abutting the Bio Energy parcels in December 2002 when Bio Energy applied to transfer the permit to Regensis and in February 2003 when Regensis applied to modify the permit, is affiliated with and

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receives mail at the same address as Bio Energy and Regeneis. CFNH further alleges that certain residential property owners who own property abutting the Bedford Corp. parcels should have received notice of those applications under Env-Wm 303.05(d).

32. By statute, DES is charged with conducting fair and procedurally proper permit proceedings. Accordingly, CFNH's allegations are of concern to the agency. If true (and the agency by referencing them makes no admission or acknowledgment of their truth or falsity), the allegations could be grounds for reopening the permit transfer and modification proceedings, independent of the possible grounds for revocation described elsewhere in this notice.

33. Therefore, DES orders that, should Regeneis choose to contest the proposed revocation, the company also show cause why the original abutter notification was legally sufficient, and if not, why the applications should not be reopened to provide proper notice.

IV. VIOLATIONS ALLEGED

1. William Dell'Orfano made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer.
2. William Dell'Orfano's false or misleading statement to DES in the course of the permit proceedings calls into question whether Regeneis has the reliability and integrity to operate a solid waste facility.

V. PROPOSED ACTION

1. Under the circumstances, the permittee cannot correct the underlying problem. Therefore, DES proposes to revoke the Permit.
2. DES further orders Regeneis to show cause why, if the permit is not revoked, the 2003 application for permit modification should not be reopened based on inadequate notice to abutters.

VI. Hearing, Required Response

Regeneis has the right to a hearing to contest these allegations before the proposed license action is taken. A hearing on this matter has been scheduled for Friday, January 7, 2005 beginning at 10:30 a.m. in Room C-112/113 of the DES offices at 29 Hazen Drive, Concord, N.H. This hearing shall also serve as the opportunity for Regeneis to show cause as provided in paragraph V.2, above.

This hearing will be a formal adjudicative proceeding conducted pursuant to RSA 541-A:31, III and RSA 541-A:31, III(c). At the hearing, Regeneis and any witnesses Regeneis may call will have the opportunity to present testimony and evidence as to why the proposed action should not be taken. All testimony at the hearing will be under oath and will be subject to cross examination.

RSA 541-A:31, III(c) provides that Regeneis has the right to have an attorney present to represent Regeneis at its own expense.

Regeneis may waive its right to a hearing. If Regeneis waives the hearing, DES will revoke the Permit upon receipt of the signed waiver and will notify Regeneis by certified mail, return receipt requested. Regeneis should notify DES of its decision by filling out and returning the enclosed form by December 6, 2004.

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Notice of Proposed License Action No. 04-010

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Pursuant to Env-Win 306.03(c)(2)b., if Regeneis fails to appear at the hearing, the revocation will become effective as of the date of the hearing.

Anyone having questions regarding this matter should contact Senior Assistant Attorney General Jennifer J. Patterson at 271-3679.

COPY
Anthony J. Zonta, P., Director
Waste Management Division

Certified Mail #7000 0600 0023 9936 2199

Enclosure

cc: Board of Selectmen, Town of Hopkinton
Hopkinton-Webster Solid Waste District
Robert P. Cheney, Esq.
Jennifer Patterson, Senior Assistant Attorney General
Michael P. Nolin, Commissioner
Gretchen Hamel, Legal Unit Administrator
Mike Guilfooy, WMD

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NHDES.WASTE MGMT DIV

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Notice of Proposed License Action No. 04-010

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RETURN THIS PAGE ONLY by December 6, 2004

APPEARANCE

Regenesis Corporation desires a hearing regarding the proposed Permit revocation.

Name: _____ Title: _____
(Please type or print legibly) (Please type or print legibly)

Signature _____ Date: _____

WAIVER OF HEARING

On behalf of Regenesis Corporation, I certify that I understand Regenesis Corporation's right to a hearing regarding the revocation of the Permit and that Regenesis Corporation hereby waives those rights.

Name: _____ Title: _____
(Please type or print legibly) (Please type or print legibly)

Signature _____ Date: _____

Please return to: DES Legal Unit
Attn: Michael Scialfani
P.O. Box 95
29 Hazen Drive
Concord, NH 03302-0095

TOTAL = 07

H

Regencsis Corporation
1994 Maple Street
West Hopkinton, NH 03229

Re: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

NOTICE OF PROPOSED
LICENSE ACTION
No. 04-010

December 22, 2004

ORDER ON MOTIONS TO INTERVENE

The above-captioned license proceeding is scheduled for a hearing on the merits on January 7, 2005. Motions to Intervene have been filed by the Town of Hopkinton, Resident's Environmental Action Committee for Health ("REACH") and by the Citizens for a Future New Hampshire ("CFNH"). No objections have been filed to the Motions to Intervene by the parties to the proceeding, the Department of Environmental Services and Regencsis Corporation.

All three Motions to Intervene are granted. The Town of Hopkinton has a statutory right to participate in the proceeding as the host community for the Regencsis facility. RSA 541-A:39. As described in their Motions to Intervene, REACH and CFNH are non-profit corporations who represent persons allegedly affected by the operation of the Regencsis facility in Hopkinton. Neither REACH nor CFNH has standing to participate in this proceeding as a matter of right, because the interests they assert are essentially the interests of the public in general. See Appeal of Richards, 134 N.H. 148 (1991). No rights, duties, privileges, immunities, or other substantial legal interests of REACH or CFNH will be directly affected by the outcome of the Regencsis license proceeding. However, the Motions filed by REACH and CFNH describe active participation by both groups in the legal and regulatory issues surrounding the Regencsis facility. Intervention by REACH and CFNH will further the interests of justice by allowing non-governmental community representatives to participate in the proceeding. Both REACH and CFNH are represented by counsel who have demonstrated familiarity with the Administrative Procedure Act, RSA 541-A, and the procedural rules of the Department of Environmental Services, Env-C Chapter 200. Thus, intervention by REACH and CFNH is not likely to impair the orderly and prompt conduct of the proceedings. Intervention is appropriate under RSA 541-A:32, II.

Copies of the Assented-to Motion to Reschedule Prehearing Conference and the Department's letter rescheduling the prehearing conference to January 4, 2005, are attached to this order.

COPY
Department of Environmental Services
By: Michael J. Walls
Michael J. Walls, Presiding Officer

cc: Jennifer J. Patterson, Senior Assistant Attorney General
Edward A. Haffer, Esquire

I

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
OFFICE OF THE COMMISSIONER

_____)
_____)
REGENESIS CORPORATION_____)
1994 Maple Street_____)
West Hopkinton, NY 03229_____)
_____)
_____)
Re: Solid Waste Permit No. DES-SW-SP-002_____)
Bio Energy Solid Waste Facility_____)
West Hopkinton_____)
_____)
_____)

STIPULATED FACTS AS TO ABUTTER NOTIFICATION ISSUES

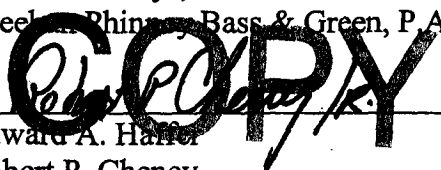
- A. At the time of Bio Energy Corporation's October, 2001 Application for a Standard Permit for Solid Waste Management Facility:
- 1) Bio Energy Corporation, with a mailing address of 1994 Maple Street, West Hopkinton, NH, 03229, owned the property where the subject facility was located: Assessor's Map 210, Lots 20 & 21 (the "Bio Energy Property").
 - 2) Notice of Bio Energy Corporation's September 2001 intent to file the application with the New Hampshire Department of Environmental Services ("DES"), prior to it being filed, was sent or hand-delivered exclusively to the following:
 - a. PetroFiber Corporation, c/o Bio Development Corporation, 749 East Industrial Drive, Manchester, NH, 03109, owner of the property at Map 210, Lot 25.1;
 - b. Papertech, Inc., 1966 Maple Street, West Hopkinton, NH, 03229, owner of the property at Map 210, Lots 18.01, 19, 25.2, 18 & 26;
 - c. USA Hopkinton-Everett Reservoir, 2089 Maple Street, West Hopkinton, NH, 03229, owner of the property at Map 210, Lots 22 & 23;
 - d. Town of Hopkinton, Town Clerk;
 - e. Town of Hopkinton Selectmen's Office; and
 - f. Hopkinton-Webster Solid Waste District.

- 3) William Dell'Orfano and Anthony DiNapoli were shareholders, officers and directors of PetroFiber Corporation and Bio Energy Corporation.
- B. At the time of Bio Energy Corporation's December, 2002 transfer application of their solid waste management facility permit:
- 1) Bio Energy LLC, with a mailing address of 1994 Maple Street, West Hopkinton, NH, owned the Bio Energy Property.
 - 2) Notice of Bio Energy Corporation's December 2002 intent to file the transfer application with DES, prior to it being filed, was sent or hand-delivered exclusively to the following:
 - a. PetroFiber Corporation, c/o Bio Development Corporation, 749 East Industrial Drive, Manchester, NH, 03109, owner of the property at Map 210, Lot 25.1;
 - b. The Bedford Corporation, c/o Bio Development Corporation, 749 East Industrial Drive, Manchester, NH, 03109, owner of the properties at Map 210, Lots 18.01, 19, 19.01, and 25.2;
 - c. CHI Energy Inc., Andover Business Park, 200 Bullfinch Drive, Andover, MA 01810, owner of the property at Map 210, Lot 24.
 - d. USA Hopkinton-Everett Reservoir, 2089 Maple Street, West Hopkinton, NH, 03229, owner of the property at Map 210, Lots 22 & 23;
 - e. Town of Hopkinton, Town Clerk;
 - f. Town of Hopkinton Selectmen's Office; and
 - g. Hopkinton-Webster Solid Waste District.
 - 3) William Dell'Orfano and Anthony DiNapoli were shareholders, officers and directors of PetroFiber Corporation and The Bedford Corporation.
 - 4) William Dell'Orfano and Anthony DiNapoli were members of Bio Energy LLC.
 - 5) William Dell'Orfano was the sole shareholder and director of Bio Energy Corporation (in dissolution and winding up pursuant to RSA 293-A:14.05(a)) and Regenesis Corporation.
 - 6) Notice of Bio Energy Corporation's 2002 intent to file the transfer application with DES, prior to it being filed with DES, was not sent to owners of the properties abutting PetroFiber Corporation's or The Bedford Corporation's properties, except as identified in B.2) above.
- C. At the time of Regenesis Corporation's February, 2003 request to modify permit DES-SW-SP-02-002:
- 1) Bio Energy LLC owned the Bio Energy Property.

- 2) Notice of Regenesys' January 2003 intent to file the application with DES, prior to it being filed, was sent or hand-delivered exclusively to the following:
- a. PetroFiber Corporation, c/o XGenesys Development Corporation, 749 East Industrial Drive, Manchester, NH, 03109, owner of the property at Map 210, Lot 25.1;
 - b. The Bedford Corporation, c/o XGenesys Development Corporation, 749 East Industrial Drive, Manchester, NH, 03109, owner of the properties at Map 210, Lots 18.01, 19, 19.01, and 25.2;
 - c. CHI Energy Inc., Andover Business Park, 200 Bullfinch Drive, Andover, MA 01810, owner of the property at Map 210, Lot 24.
 - d. USA Hopkinton-Everett Reservoir, 2089 Maple Street, West Hopkinton, NH, 03229, owner of the property at Map 210, Lots 22 & 23;
 - e. Town of Hopkinton, Town Clerk;
 - f. Town of Hopkinton Selectmen's Office; and
 - g. Hopkinton-Webster Solid Waste District.
- 3) William Dell'Orfano and Anthony DiNapoli were shareholders, officers and directors of PetroFiber Corporation and The Bedford Corporation.
- 4) William Dell'Orfano and Anthony DiNapoli were members of Bio Energy LLC.
- 5) William Dell'Orfano was the sole shareholder and director of Bio Energy Corporation (in dissolution and winding up pursuant to RSA 293-A:14.05(a)) and Regenesys Corporation.
- 6) Notice of Regenesys January 2003 intent to file the application with DES, prior to it being filed with DES, was not sent to owners of the properties abutting PetroFiber Corporation's or The Bedford Corporation's properties, except as identified in C.2) above.

Respectfully Submitted,

REGENESIS CORPORATION,
By its Attorneys,
Sheehan, Rhinney, Bass & Green, P.A.



Edward A. Haner
Robert P. Cheney
John-Mark Turner
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

T: 603-627-8115
F: 603-641-2352
E: ehaffer@sheehan.com

CFNH,
By its attorney,

COPY
Jeffrey L. Roelofs, Esq.
Anderson & Kreiger LLP
43 Thorndike Street
Cambridge, Massachusetts 02141
Tel: (617) 252-6575
NH Bar Number 16015

Dated: April 20, 2005

CERTIFICATION

I hereby certify that a copy of the foregoing has on this 22nd day of April, 2005 been forwarded, *provided by hand at hearing*
~~via Facsimile and First Class Mail, postage prepaid, to:~~

Counsel for Respondent

Edward A. Haffer, Esq.
Sheehan, Phinney, Bass & Green
1000 Elm Street
PO Box 3701
Manchester, NH 03105-3701

Counsel for DES

Jennifer J. Patterson, Esq.
Senior Assistant Attorney General
Office of Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301

Counsel for Town of Hopkinton

~~Russell F. Hilliard
Upton & Hatfield LLP
10 Centre Street
PO Box 1090
Concord, NH 03302-1090~~

Co-Counsel for Town of Hopkinton

Barry Needleman
McLane, Graf, Raulerson &
Middleton
15 North Main Street
Concord, New Hampshire 03301

Counsel for REACH

John E. Friberg, Jr., Esq.
Nixon Peabody LLP
889 Elm Street
Manchester, NH 03101

Co-Counsel for REACH

Ronald J. Lajoie, Esq.
Wadleigh, Starr and Peters,
PLLC
95 Market Street
Manchester, New Hampshire
03102

COPY
Jeffrey L. Roelofs

J

STATE OF NEW HAMPSHIRE

 Regenesia Corporation
 1994 Maple Street
 West Hopkinton, NH 03229

Re:
 SOLID WASTE PERMIT NO. DES-SW-SP-002
 BIO ENERGY SOLID WASTE FACILITY
 West Hopkinton

Hearing held at N.H. Department of Environmental
 Services, 29 Hazen Drive, Concord, New Hampshire,
 on Tuesday, April 19, 2005, commencing at 9:30 a.m.

HEARING OFFICER:
 Michael J. Walls, Esq.
 Department of Environmental Services
 Assistant Commissioner

Also present:
 Michael Sciafani, Esq.
 Legal Assistant, Appeals Clerk

Court Reporter:
 Pamela Carle, CCR, RPR
 New Hampshire CCR No. 109 (RSA 331-B)

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WITNESS: HARRY SMITH, continued

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WITNESS: TREY DYKSTRA

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8 By Ms. Patterson 186
 By Mr. Haffer 197

WITNESS: WILLIAM DELL'ORFANO

EXAMINATION: PAGE

11 By Ms. Patterson 201

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APPEARANCES

Representing Department of Environmental Services:
 DEPARTMENT OF JUSTICE
 OFFICE OF THE ATTORNEY GENERAL
 33 Capitol Street
 Concord, New Hampshire 03301

Representing Regenesia Corporation:
 SHEEHAN, PHINNEY, BASS & GREEN
 1000 Elm Street
 Manchester, New Hampshire 03105
 By: Edward A. Haffer, Esq.
 John-Mark Turner, Esq.
 Robert P. Cheney, Jr., Esq.

Representing the Town of Hopkinton:
 McLANE, GRAF, RAULERSON & MIDDLETON
 15 North Main Street
 Concord, New Hampshire 03301
 By: Barry Needleman, Esq.
 N. Jonathan Peress, Esq.

Representing Citizens for a Future New Hampshire:
 ANDERSON & KREIGER
 43 Thorndike Street
 Cambridge, Massachusetts 02141
 By: Jeffrey L. Roelofs, Esq.
 Jennie Merrill, Esq.

Representing Residents Environmental Action
 Committee for Health:
 WADLEIGH, STARR & PETERS
 95 Market Street
 Manchester, New Hampshire 03101
 By: Ronald J. Lajoie, Esq.
 And
 NIXON, PEABODY
 889 Elm Street
 Manchester, New Hampshire 03101
 By: John E. Friberg, Jr., Esq.

II-4

CHAIRMAN WALLS: Well, we're back for

day 2 in the hearing for the Regenesia matter. As
 I recall, we left off with Mr. Smith on the witness
 stand, and he was about to be cross-examined by
 Attorney Roelofs.

So, Mr. Smith. Let me just remind you
 that you're still under oath.

THE WITNESS: Okay.

(Harry Smith, previously sworn)

EXAMINATION

BY MR. ROELOFS:

Q. Good morning, Mr. Smith. Jeff Roelofs
 with CFNH.

A. Good morning.

Q. I'd like to hand you a few exhibits
 that I'll be getting to in my line of questions.
 There will be some additional exhibits that I'll
 refer to that you'll find in the binder here. I'll
 give you the exhibit number and identify which of
 the volumes contain which exhibit numbers to help
 you find them amongst the pile.

A. Okay.

Q. I'd first like to draw your attention

1 to intervenor Exhibit No. 1, which is at the top of
2 your stack, which is Regenesys' answer to the
3 amended notice of proposed license action.

4 And if you will turn to the answer to
5 paragraph 26 on page 8. Looking first at
6 allegation No. 26, it reads, Bio Energy had
7 originally applied for a solid waste permit in 2001
8 because it proposed to burn waste wood material
9 classified as solid waste, which made the operation
10 an incineration facility under the solid waste
11 rules.

12 Do you agree with that statement?

13 A. **Not completely.**

14 Q. Why not?

15 A. **Because, yes, we applied for the permit
16 and -- to burn material that was classified as
17 solid waste, but it's my understanding that the
18 facility since it started was always a solid waste
19 incinerator, because it burned waste woods, it was
20 just a permit-exempt solid waste incinerator. And
21 now that we proposed to burn wood generated from C
22 and D material, it now required a permit.**

23 Q. Looking to the answer to paragraph

1 No. 26 where it starts out, further answering, it
2 reads -- this is Regenesys' answer -- because of
3 the nature of the wood material burned in the past,
4 the facility was exempt from any requirement to
5 obtain a standard permit for a solid waste
6 facility. Correct?

7 A. **Yeah. That's what I just stated, yes.**

8 Q. And am I correct that Bio Energy has
9 burned wood chips derived from construction and
10 demolition debris for many years?

11 A. **No, that's not correct.**

12 Q. Why not?

13 A. **Because burning wood from construction
14 demolition debris requires a permit, and we burned
15 wood from whole tree chips, and then we burned
16 drier material that was generated from pallets,
17 crating material, those types of things. Those
18 types of materials are permit exempt under the
19 solid waste rules.**

20 Q. I'd like to draw your attention to
21 intervenors' Exhibit No. 132, which you'll find in
22 volume 15.

23 A. **Volume --**

1 Q. I'm sorry, volume 5, Exhibit No. 132.

2 Which is a petition by REACH, and I'd like you to
3 turn to the page Bates stamped on the bottom
4 right-hand corner as INT 1473. Do you recognize
5 that document?

6 A. **Yes, I do.**

7 Q. What is this?

8 A. **This is the document that was prepared
9 in the court case with the Town of Hopkinton.**

10 Q. And this document consists of the
11 verified petition of Bio Energy, LLC and Regenesys
12 Corporation against the town, correct?

13 A. **Yes.**

14 Q. Filed in the New Hampshire Superior
15 Court?

16 A. **Yes.**

17 Q. I'd like you to look at paragraph
18 No. 14 of that document on page 5, which reads,
19 throughout the course of its operation spanning
20 nearly two decades, Bio Energy has utilized a fuel
21 mix of wood chips from a wide range of waste wood
22 resources. These have included waste wood from
23 forestry and lumbering operations, in parenthesis,

1 is defined as whole tree chips, and other waste
2 wood such as shavings, sawdust, chipped pallets,
3 chipped plywood, wood chips from C and D wood, and
4 some pulp chips. Do you see that?

5 A. **Yes, I do.**

6 Q. Going to page 13, paragraph 28, last
7 sentence. It reads, at all relevant times, the
8 town has been fully aware that Bio Energy was
9 burning wood chips derived from a range of fuel
10 sources, including wood chips derived from C and D
11 wood. Do you see that?

12 A. **Yes.**

13 Q. I'd like you now to look at
14 Exhibit No. 147, which is in volume 6.

15 MR. HAFFER: Well, Mr. Chairman, at
16 this point I am going to enter an objection. 146?

17 MR. ROELOFS: Exhibit 147.

18 MR. HAFFER: 147. On the face of it,
19 it's a December 24th, 1986 letter, and I am
20 skeptical right from the start that this can be
21 relevant, directly related to this proceeding,
22 given what the principal issues are.

23 CHAIRMAN WALLS: Attorney Roelofs, how

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1 is this relevant to the proceeding?

2 MR. ROELOFS: Mr. Walls, we anticipated
3 this objection, obviously we're getting into some
4 historical documents, this has been issue we have
5 discussed previously.

6 Previously we discussed this in the
7 context of the original notice that was issued,
8 which resulted in a ruling by you related to the
9 hearing issues.

10 After that ruling came out, the
11 department issued an amended notice, which we think
12 broadened the inquiry.

13 If I may, I'd like to submit to you for
14 the record a memorandum on the issues. I'm giving
15 you two copies. I've already circulated this to
16 counsel yesterday so that they knew it would be
17 coming.

18 And it's a memorandum that CFNH is
19 submitting to clarify why the issues relating to
20 these historical documents, and more generally the
21 reliability and integrity of the respondent, are
22 properly before you as a result of the amended
23 notice.

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1 I think this is an appropriate time, if
2 we may, to engage in this dialogue, because what I
3 would like to do with the witness is to go through
4 some -- a few of the historical documents, and I'll
5 identify those for you, if you allow me to, and I
6 will tie that back into the original permit
7 application.

8 Because what you will see is that the
9 original permit application misconstrues, at least
10 by -- by implication, what the operations have
11 consisted of and what they were proposing to do at
12 this facility. So it ties into the pattern of
13 misleading conduct that is directly related to this
14 proceeding.

15 So if you're agreeable, I think that it
16 probably is appropriate for Mr. Haffer and I and
17 other counsel who are interested in this subject to
18 engage in a dialogue on this relevancy point now.

19 CHAIRMAN WALLS: Before you do that,
20 let's look at the amended notice, and I'd like you
21 to point to me how any amendment to the notice
22 broadened the scope of this inquiry.

23 MR. ROELOFS: Okay. Paragraphs 10 and

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1 19 of the amended notice.

2 CHAIRMAN WALLS: Hold up one second
3 until I find it.

4 MR. ROELOFS: Okay.

5 Paragraphs 10 and 19 begin with a
6 discussion of the respondent's conduct in applying
7 for the original solid waste permit, ultimately
8 issued on May 28, 2002. So clearly it's going
9 beyond just the Type IV modification requested in
10 September, which the respondent claims is the sole
11 focus of this proceeding; we think inaccurately.

12 The amended notice in paragraphs 11 to
13 36, and then 41 to 47, which is the meat of the
14 amended notice, walks through a pattern of
15 misrepresentations, omissions and misleading
16 statements in the course of applying for both the
17 original permit, as well as the Type IV
18 modification. And specifically let me draw your
19 attention to a few of those paragraphs.

20 In section 3, paragraph 39, the amended
21 notice states that criteria for permit denial
22 include the applicant's failure to demonstrate
23 sufficient reliability, expertise, integrity and

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1 competence to operate a solid waste facility per
2 the cited statutory provision.

3 Paragraph 47 states that the fact that
4 Regenesis officials supplied DES with false or
5 misleading information, as alleged more
6 specifically in paragraphs 1 through 46 above,
7 calls into question whether the company has
8 sufficient reliability and integrity to operate a
9 solid waste facility.

10 Paragraph -- moving to section 402.
11 Regenesis -- it states, Regenesis officials. False
12 or misleading statements to DES in the course of
13 the permit proceedings call into question whether
14 Regenesis has the reliability and integrity to
15 operate a solid waste facility.

16 And finally, in paragraph -- section 5,
17 paragraph 11, under the circumstances the permittee
18 cannot correct the underlying problem, therefore
19 DES proposes to revoke the permit.

20 We think these provisions make it clear
21 that the amended notice is not focused solely on
22 the truthfulness of Dell'Orfano's 2002
23 certification as stated by Regenesis counsel. That

1 was but one of many false or misleading statements
2 or omissions in the larger course of conduct.
3 The issues now pursuant to the amended
4 notice have been broadened to include Regenesis and
5 Bio Energy's lack of reliability and integrity as
6 evidenced by the entire pattern of conduct, not
7 simply the false certification.

8 In addition to that, in Regenesis'
9 answer to the amended notice, and specifically
10 paragraph 26, the one that I was just going through
11 with Mr. Smith, they open up the question of past
12 wood activities, and they -- although they didn't
13 have to do this, responded further to that -- that
14 allegation, No. 26, by discussing its past
15 activities, and by doing that they have opened the
16 door for us to inquire as to what that explanation
17 means, and what its significance is.

18 In paragraph 26 what Regenesis states
19 is because of the nature of the wood material
20 burned in the past the facility was exempt for any
21 requirement to obtain a standard permit for a solid
22 waste facility. It goes on to articulate what it
23 proposed to do.

1 And what I will demonstrate through the
2 documents I'd like to walk through is that, in
3 fact, in their 2001 application, they were
4 purportedly proposing to do something that they had
5 already been doing for many years.

6 And I think that's relevant, because I
7 think, for example, the notice of intent to file
8 that original application implied that they were
9 proposing to do something new, and, in fact, they
10 weren't, and that's the beginning of a pattern of
11 conduct of misleading statements. Misleading to
12 the public, as well as to the department.

13 CHAIRMAN WALLS: Attorney Lajoie.

14 MR. LAJOIE: Yes, if I may add to that.
15 Regardless of your ruling on the relevancy issue,
16 there's a credibility sure, and it can be -- this
17 witness can be impeached. He said that they hadn't
18 been doing burning of C and D, and that they needed
19 a permit to do it, and here we have a contradictory
20 statement.

21 So on the basis of credibility alone of
22 this witness, you're going to see that documents go
23 both ways on factual issues that this company is

1 being -- putting out.

2 So even if you didn't rule on the
3 relevancy issue at this point, it certainly goes to
4 credibility issues and should be allowed to come in
5 and be inquired about at this time. Thank you.

6 CHAIRMAN WALLS: Anybody else from the
7 intervenors' side or the state's side want to
8 speak? I see no one. Okay, Attorney Haffer.

9 MR. HAFFER: Mr. Chairman, if I recall
10 correctly, when the issue of reliability and
11 integrity was raised in pre-hearing conferences, if
12 my memory serves me, the Chair ruled properly, that
13 the reference to reliability and integrity was not
14 generalized, rather it was confined to the three
15 specific underlying issues that were specifically
16 alleged in the notice initially, and then again in
17 the amended notice.

18 And those three issues were whether or
19 not Mr. Dell'Orfano's December 2002 certification
20 was true or false; whether or not there had been
21 disclosure of the fact that Bio Energy corporation
22 was in dissolution; and whether or not the notice
23 was sent to the appropriate people, namely the

1 people specified in the rules, in conjunction with
2 one of the allegations that had initially been
3 raised by CFNH in court, and then incorporated into
4 this -- into the notice that was filed by the
5 state.

6 Those are the three principal issues,
7 and reliability and integrity were to be addressed
8 in the context of those three issues, and only
9 through those three issues.

10 When the state filed its motion to
11 continue hearing and to allow amendment of
12 revocation notice, the state said in paragraph 4,
13 and I -- and the state said this correctly -- the
14 proposed amendment does not change the fundamental
15 nature of the state's claims, but merely provides
16 additional factual allegations to support those
17 claims.

18 We agreed with that. In our response
19 to the state's motion, we said essentially that was
20 right, however, that the additional allegations
21 being actually incorporated into an amended notice
22 was not necessary, that we could have gone forward
23 earlier with the points that were raised in the

1 amended notice simply as incorporated within the
2 original notice.

3 The fact of the matter is, this amended
4 notice does not -- contrary to Mr. Roelofs'
5 assertions -- does not enlarge the scope of the
6 proceeding. We are within the very same scope that
7 we were with the original notice, and as the Chair
8 correctly ruled previously, reliability and
9 integrity is to be examined in the context of the
10 three specific allegations, again, one, whether or
11 not the December 2002 Dell'Orfano certification was
12 true or false, two, whether or not there was
13 disclosure of the fact that Bio Energy Corporation
14 was in dissolution, and, three, whether or not
15 there was the appropriate notice given as required
16 by the rules.

17 And that is the -- those three issues
18 define the scope for reliability and integrity in
19 this proceeding, and to go back to 1986 to open the
20 door is way, way outside the scope of this
21 proceeding. And we have had no notice, no fair
22 notice that we were to defend against matters going
23 back to 1986. So this is clearly irrelevant,

1 Mr. Chairman, and we object.

2 CHAIRMAN WALLS: We are going to take a
3 15-minute recess so that I can read the memorandum.

4 MR. ROELOFS: Okay, thank you.

5 (Recess taken.)

6 CHAIRMAN WALLS: I've just taken a
7 moment to read the memorandum of CFNH regarding
8 reliability and integrity issues under the amended
9 notice of proposed licensing action.

10 Having read that and heard your
11 argument, Mr. Roelofs, and Attorney Haffer's
12 argument, I am going to sustain Attorney Haffer's
13 objection to this line of inquiry.

14 The amended notice read as a whole does
15 include some introductory predicate factual
16 allegations, but it largely culminates in the
17 assertion of the set of facts that have been
18 alleged that relate to the alleged
19 misrepresentation concerning the felony conviction,
20 and that's the allegation, and that's what I'm
21 interested in hearing about.

22 So I'm not going to allow any general
23 inquiry into the reliability and integrity of the

1 company with respect to prior environmental
2 violations or prior misrepresentations unrelated to
3 the felony conviction, and also related to the
4 different corporations and companies that are
5 apparently related to this site.

6 So I'm looking at -- I'd like to hear
7 evidence of both those two things, and one is the
8 felony conviction, and the other is the corporate
9 or company structure that surrounds this facility.
10 Those to me seem to be the most relevant inquiries
11 here.

12 So I will sustain any further
13 objections to broad inquiries into integrity and
14 reliability of the company relating to prior
15 misstatements, other than those specified.

16 MR. ROELOFS: Does that ruling apply to
17 the impeachment value of these documents as well?
18 Are you not permitting me to use these documents to
19 impeach Mr. Smith's testimony that the facility had
20 not burned wood chips derived from C and D waste?

21 CHAIRMAN WALLS: If you can in a very
22 efficient and expeditious way impeach this witness'
23 credibility with that kind of information, you'll

1 be allowed to do that. But we're not going to
2 dwell on the substance, the accuracy or
3 truthfulness of the allegations. If you want to
4 point out a discrepancy between something that was
5 said some time ago and something that was said
6 recently, that's fine. But we're going to do that
7 quickly and not in a repetitive manner.

8 So that gives you a little bit of an
9 opening to make some use of this information. But
10 please recognize that I think I'm going to assess
11 any witness' credibility in a holistic way, and I
12 don't want you to overdo the point of attacking
13 this witness' credibility, or any witness'
14 credibility, with these prior inconsistent
15 statements.

16 MR. ROELOFS: I will attempt to keep it
17 focused.

18 CHAIRMAN WALLS: Thank you.

19 BY MR. ROELOFS:

20 Q. And I do intend to proceed to refer you
21 to intervenor Exhibit 147. Do you recognize this
22 document?

23 A. If I may, I'd just like to go back to

1 the answer that I gave when you asked me about
2 question 26?

3 Q. I don't mean to seem rude, but if your
4 counsel wants you to go back to that answer, I'm
5 sure he'll give you an opportunity to do that. I
6 would prefer to proceed with my line of inquiry
7 permitted by Mr. Walls.

8 So looking at intervenors'
9 Exhibit No. 147, do you recognize that document?

10 A. Yes. I do.

11 Q. What is this?

12 A. It is a long-term purchase and sale
13 agreement with Napoli Wrecking.

14 Q. And the date of this document?

15 A. December 24th, 1986.

16 Q. This document related to Bio Energy's
17 purchase of wood chips from Napoli Wrecking, is
18 that correct?

19 A. Yes.

20 Q. And those wood chips were derived from
21 demolition materials originating in Massachusetts,
22 correct?

23 A. To qualify what type of wood that we

1 were looking for under this contract, this was wood
2 that was taken from the waste stream that was
3 unpainted, untreated, clean wood materials.

4 MR. SCALFANI: Just a minute, please.
5 Go ahead.

6 A. It was -- it was wood that was taken
7 from the waste stream that was unpainted, untreated
8 wood material that was ground up and made into
9 fuel.

10 When I -- when I stated that we didn't
11 burn C and D material, I was referring to the C and
12 D material that we're currently talking about in
13 our current permit, which is wood material that is
14 painted and coated. There's a big difference
15 between clean, untreated, un -- unpainted wood
16 material and the painted wood material.

17 Q. Both are derived from construction and
18 demolition debris?

19 A. They can be, yes.

20 Q. Turning to page 11 of this agreement
21 with Napoli, you'll see some force majeure
22 provisions, and in subsection J2, it reads, for
23 seller, such cause shall include as well a material

1 slow down of, cessation of, or a moratorium upon
2 the interior and/or exterior demolition of
3 structures within Eastern Massachusetts, such that
4 seller is reasonably unable to procure through
5 tipping fees paid by the possessor of the wood
6 sufficient waste, used wood, to satisfy its
7 obligations to sell under this agreement. Correct?

8 A. Correct.

9 Q. Turning back to the previous page --
10 MR. HAFFER: That's incomplete. Would
11 you read the next -- the rest of that passage,
12 please?

13 MR. ROELOFS: I'm not sure I have to,
14 but I'm happy to do that. It continues, and a stop
15 operations order by any governmental authority.

16 Q. Going to the previous page, page 10,
17 there are provisions related to the specifications
18 of the wood chips, and in subsection H2 towards the
19 bottom it reads, seller shall not deliver to buyer
20 any load of wood chips knowing that any of the wood
21 chips comprising the load contains any substance
22 which when handled, stored or burned at buyer's
23 plant would give off, emit or leave as a residue,

1 any hazardous particulate, or other substance
2 violating any federal law regulating hazardous
3 substances -- and it goes on -- provided that,
4 without limitation, this subparagraph 2 expressly
5 shall not require seller, nor impose any
6 responsibility upon it to inspect, examine or test
7 any wood or wood chips to determine if they contain
8 any such substance. Is that correct?

9 A. That's what it says, yes.

10 Q. I'd like to draw your attention now to
11 intervenor Exhibit 149, which is in the same volume
12 before you. Do you recognize this document?

13 A. Yes.

14 Q. What is this?

15 A. It's a letter from NHFE.

16 Q. Who is NHFE?

17 A. New Hampshire Forest and Engineering.
18 They are a consultant that we hired to run our ash
19 spread program.

20 Q. And in this letter, NHFE states -- I'm
21 sorry, this is a letter to Patricia Hannon of the
22 state -- New Hampshire waste management division,
23 correct?

1 A. **Correct.**

2 Q. In the letter NHFE states, the results
3 of the November Bio Energy wood ash sample indicate
4 a lead level of 720 MG/KG. One sentence later it
5 continues. Because of the high lead level of the
6 November sample, more time will be needed to
7 demonstrate their wood ash quality consistency. Is
8 that correct?

9 A. **Yes, it is. That's what it says.**

10 Q. Turning to intervenor Exhibit No. 153,
11 which purports to be a meeting summary, do you
12 recognize this document?

13 A. **Yes, I do.**

14 Q. And this purports to relate to a
15 meeting on November 16, 1995 between Bio Energy
16 officials and officials of the Department of
17 Environmental Services, correct?

18 A. **Correct.**

19 Q. You attended that meeting?

20 A. **I did.**

21 Q. And the document has a section that
22 says topic, and reads, high total lead
23 concentrations in ash due to burning fuel

1 containing painted demolition debris, do you see
2 that?

3 A. **I do see that.**

4 Q. It identifies four issues. No. 1, it
5 states, Bio Energy is not a permitted solid waste
6 facility, therefore should not be utilizing refuse
7 derived fuel. No. 2, Bio Energy has a certificate
8 for direct reuse to land spread wood ash that
9 result in ash exceeding land spreading limits.
10 No. 3, concerns regarding the possibility of
11 hazardous waste generation and the subsequent
12 disposal. No. 4, the ash management QAQC plan is
13 also a quality control mechanism for PetroFiber, a
14 sister plant, Henniker, that processes clean wood
15 under a permit by rule and provides fuel to
16 Bio Energy Corp. Did I read that correctly?

17 A. **You read that correctly.**

18 Q. Going to intervenor Exhibit No. 154.
19 Do you recognize this document?

20 A. **Yes, I do. It's my response as a
21 follow-up to the meeting.**

22 Q. And it reads in part, starting with the
23 second paragraph, the first indication that there

1 was a problem was on September 18, 1995 when we
2 received an ash analysis from a boiler test. Two
3 sentences later it says, the analysis revealed a
4 higher than normal lead content. Two sentences
5 later, it was determined that the source of the
6 lead was from the fuel that was purchased from Star
7 Recycling.

8 The next paragraph starts out, during
9 this period, July 7, 1995 through September 18,
10 1995, Bio Energy purchased 4,447.72 tons of fuel
11 from Star Recycling. And the last sentence reads,
12 during this period 530 tons of ash was produced,
13 which all went to the Hopkinton-Webster landfill.
14 Did I read those sections correctly?

15 A. **Yes, you did.**

16 Q. Did Bio Energy also have a contract
17 with Star Recycling to purchase wood chips derived
18 from construction and demolition debris?

19 A. **No, it wasn't a contract. It was a
20 verbal agreement.**

21 Q. So Star Recycling had not committed to
22 any written contract whereby it would inspect or
23 test wood chips prior to selling them to

1 Bio Energy, is that correct?

2 A. **That's correct. I'd like to further
3 explain --**

4 Q. I'm sorry, Mr. Smith. Again, if your
5 counsel wants you to further explain, he'll give
6 you the opportunity to do that. Thank you.

7 CHAIRMAN WALLS: Attorney Roelofs, how
8 is this line of inquiry impeaching this witness'
9 credibility?

10 MR. ROELOFS: Because he had testified
11 that the company had not burned -- initially he
12 testified they had not burned any wood chips
13 derived from construction demolition debris. These
14 documents show that they did.

15 He then attempted to qualify that by
16 saying, okay, we burned wood chips derived from C
17 and D debris, but not painted C and D debris. And
18 these results confirm that, in fact, they did. The
19 lead is coming from somewhere. And the DES in its
20 1995 memo came to the conclusion that it was coming
21 from painted materials generated from C and D
22 debris.

23 MR. HAFFER: Mr. Chairman, if I may.

1 CHAIRMAN WALLS: So you've clearly made
2 that point, so why don't you move on to something
3 else.

4 Q. Mr. Smith, turning your attention to
5 intervenor Exhibit No. 7. Do you recognize this
6 document?

7 A. Yes, I do.

8 Q. What is this?

9 A. It is our standard permit application
10 from 19 -- 2001.

11 Q. Turning to the page Bates stamped on
12 the bottom right corner INT 63, do you recognize
13 that portion of the document?

14 A. Yes.

15 Q. This is the company's notice of filing
16 of the application, is that correct?

17 A. That's correct.

18 Q. This is the document that is circulated
19 to the public to inform them as to what the company
20 is seeking, is that correct?

21 A. That's correct.

22 Q. Turning to the second page of that
23 notice, which is a continuation of the section

1 labeled description of proposed activity, it states
2 in the bottom of the first full paragraph,
3 Bio Energy is requesting NH DES approval to expand
4 its wood fuel mixture to include waste wood
5 material from construction demolition sites that
6 has been separated from other demolition debris, in
7 parenthesis, i.e. source separated wood material,
8 closed paren, prior to being processed into wood
9 chips. Do you see that?

10 A. I do see that.

11 Q. It goes on to read, according to
12 New Hampshire DES solid waste rules, if the
13 requested permit is issued, Bio Energy would be
14 categorized as an incineration facility, since it
15 proposes to burn waste wood material classified as
16 a solid waste. Did I read that correctly?

17 A. Yes, you did.

18 Q. Wouldn't you agree that this implies
19 that Bio Energy had not previously burned waste
20 wood material classified as a solid waste?

21 MR. HAFFER: Objection argumentative.

22 CHAIRMAN WALLS: Overruled.

23 A. What this says to me is that we're

1 expanding our fuel source to include wood that is
2 derived from construction and demolition materials,
3 which includes painted woods.

4 Q. I'm sorry, I don't see the reference to
5 that distinction between painted and not painted.
6 Is that in this description of proposed activity
7 somewhere?

8 A. I don't believe it is. Can I further
9 explain?

10 Q. Sure.

11 A. In -- in 1986, the facility was having
12 problems with CO emissions. The guarantees that
13 the manufacturer of the boiler provided were
14 underestimated, that -- they said that they could
15 meet a CO level, so that we didn't need a PSD
16 permit.

17 And they were -- they were higher
18 than -- than expected. So we tried many different
19 ways to lower our CO levels. One of the ways to
20 lower the CO level was to burn drier wood material.
21 And we looked at sources of this drier wood
22 material to mix with the whole tree chips to bring
23 the moisture content down.

1 We asked air resources if we could burn
2 this material, we explained what was going on, we
3 wrote a letter to them asking them if we can burn
4 dry wood materials, and air resources wrote back to
5 us saying that -- that we could burn dry wood
6 materials that could be sourced from C and D
7 materials, as long as the ultimate proximate
8 analysis was the same as whole tree chips.

9 At that time, the solid waste rules
10 didn't quantify what types of woods were solid
11 waste and what types of woods weren't solid waste.
12 So it was determined that as long as the wood was
13 unpainted, untreated, which is what we said we were
14 going to burn, that that didn't qualify as a solid
15 waste, that only -- only like the painted and
16 treated woods quantify as solid waste back then in
17 the solid waste rules.

18 It wasn't until 1997 when the solid
19 waste rules were revised, and there -- then it
20 clearly stated what was permit-exempt wood, and
21 what was not permit-exempt wood. And those rules
22 stated that crating materials, pallets, those types
23 of things were exempt, and all woods coming from

1 construction demolition activities, even if it was
2 clean, was a solid waste.

3 So that gave us clarity -- clarity, on
4 the solid waste side, what could be burned and what
5 couldn't be burned. And so activities prior to
6 1997 did include wood that came from construction
7 and demolition activities that were totally clean
8 and unpainted and untreated.

9 And so since 1997, all of the wood that
10 we burned was the crating materials, and all the
11 permit-exempt materials. And that's what I meant
12 when I said in answer 26 that we didn't burn
13 construction demolition debris material, because I
14 was using the current definition of what C and D
15 materials is.

16 Now, when they -- when the state came
17 out with their 1997 ruling, they also included any
18 woods that contained any glues or adhesives, that
19 that was a solid waste and that those woods were
20 not exempt. We had an issue with that because some
21 of the pallets and crating materials that we --
22 that was delivered to the PetroFiber facility
23 included plywood and glued materials.

1 So that is when we applied for a
2 certified waste derived product to be able to burn
3 the glued materials and that type of stuff. And we
4 specifically had to pick out any of the plywood
5 and -- and glued material from the time the rules
6 came out until we got our certified waste derived
7 product.

8 Q. Which was when?

9 A. I can't --

10 Q. Approximately.

11 A. It was shortly after the rules came
12 out. So, I don't know, maybe '98. I can't recall
13 exactly what date we got our certified waste
14 derived product for the glued materials.

15 Q. You also obtained, in connection with
16 those activities, a hazardous waste rule waiver?

17 A. Yes, we did.

18 Q. What was that required for?

19 A. That was required because of the ash.
20 New Hampshire has a hazardous waste determination
21 for the pH of a solid, which is a little bit
22 different than what -- like EPA's definition of a
23 hazardous waste is.

1 And our pH had a pH above 12. It was
2 generally 12.5. So if you used the ash as a
3 fertilizer, you could spread that ash over a
4 farmer's field, and the pH of -- above 12, 12.5
5 wasn't a problem.

6 But if you wanted to dispose of that
7 ash in a lined landfill, that wasn't okay, because
8 then you would trigger the hazardous waste rule.

9 So we applied for a waiver to be able
10 to landfill our ash with a pH above 12. And that
11 was contingent on that all of the wood material
12 that was burned to generate that ash was either
13 whole tree chips or permit-exempt material.

14 Q. And permit-exempt materials, you
15 interpret it as including clean wood, although
16 generated from construction and demolition debris?

17 A. At that time, no. Prior -- after 1997
18 it was clear in the rules what was permit exempt
19 and what wasn't permit exempt. Prior to '97 it was
20 unclear. It was generally that if it was clean,
21 unpainted, untreated that it necessarily wasn't
22 solid waste, and therefore --

23 Q. So is it your testimony that the reason

1 you applied for the solid waste permit in 2001 is
2 because you were proposing to burn painted wood
3 from construction and demolition debris?

4 A. That we were proposing to burn wood
5 from construction demolition activities that can be
6 painted.

7 Q. That could be painted?

8 A. Yes.

9 Q. But that distinction, which I think is
10 an important one, was not specified in the notice
11 of intent of filing that was circulated to the
12 public in fall of 2001, correct?

13 A. Well, after -- after 1997, as I said,
14 you couldn't burn any wood that came from
15 construction demolition activities, be it painted
16 or unpainted. And so our permit application in
17 2001 enabled us to burn clean wood from
18 construction and demolition activities, and also
19 painted wood from construction and demolition
20 activities.

21 Q. In connection with your 2001
22 application, you also requested a -- what's called
23 a test burn waiver, is that correct?

1 A. **That's correct.**

2 Q. And that was a test burn proposed to
3 use processed wood chips produced from source
4 separated wood material, which included source
5 separated wood material from construction and
6 demolition debris, correct?

7 A. **Correct.**

8 Q. I'd like to move into a new category of
9 information, Mr. Smith. And I'll turn your
10 attention to what's been marked as intervenor
11 Exhibit No. 41, which I believe is the same as the
12 state Exhibit 22. That should be in the stack of
13 documents that I put in front of you earlier.

14 A. **What number is it again?**

15 Q. 41.

16 A. **Yup.**

17 Q. Do you see it? Do you recognize that
18 document? I'm sorry, I didn't hear the answer. Do
19 you recognize that document?

20 A. **I'm looking at it.**

21 Q. Okay, take your time.

22 A. **Yes, I do.**

23 Q. What is this?

1 A. **It is a purchase and sale agreement
2 between Bio Energy Corporation and Bio Energy, LLC
3 to purchase the assets and personal property. That
4 Bio Energy, LLC would purchase the assets and
5 personal property from Bio Energy Corp.**

6 Q. Why was Bio Energy Corp. selling the
7 facility or these assets and property?

8 A. **I don't have direct knowledge, but it's
9 my understanding that because of the rate order
10 contract sale -- the rate order contract was a
11 contract -- rate order we had with public service
12 to sell electricity, and that they would buy it.
13 And that rate order was sold, and as part of that
14 sale process, in order for tax reasons, it was
15 required that Bio Energy Corp. be dissolved.**

16 Q. So there weren't any operational or
17 ownership changes contemplated through this sale?

18 A. **No.**

19 Q. Other than the name of the entity going
20 from Bio Energy Corp. to Bio Energy, LLC?

21 A. **Yes. In order to -- in order to
22 realize the tax situation, it was told to me that
23 Bio Energy Corp. had to be dissolved, and a new**

1 **entity would be brought into existence, which was
2 going to be Bio Energy, LLC. And they were going
3 to continue the operations that Bio Energy Corp.
4 had previously operated.**

5 Q. With the same owners, officers and
6 directors?

7 A. **Correct.**

8 Q. As well as employees, correct?

9 A. **Correct.**

10 Q. On page 1 of this agreement, paragraph
11 1, subsection D starts out, to the extent
12 transferrable, all permits, licenses, etcetera --
13 and this is referring to the -- this is part of
14 what is a list of the assets being transferred to
15 the LLC, correct?

16 A. **Yes.**

17 Q. And you place significance on the
18 language to the extent transferrable, correct?

19 A. **That this isn't my language, but that's
20 what it says.**

21 Q. Let me turn your attention to
22 intervenor Exhibit No. 1 again, which is Regenesi's
23 answer to the amended notice. And if you turn to

1 page 6, there's an allegation No. 20 there related
2 to this agreement, and in response the company
3 admits to the characterization of the agreement and
4 further answers, the words "to the extent
5 transferrable" were purposely used and are all
6 important. Do you see that?

7 A. **I was reading the No. 20.**

8 Q. And the language I just quoted is from
9 the answer.

10 A. **Yes, but I was not involved at all in
11 preparing the purchase and sale document. It was
12 my -- the only -- the only involvement I had with
13 this purchase and sale document was to initiate the
14 transfer of the permits. So the reasons why
15 certain language -- language was in this document,
16 I have no knowledge of that.**

17 Q. Do you have any understanding of what
18 the consequences would be if any of these permits
19 could not be transferred to the LLC?

20 A. **Yes. Basically, some of the permits
21 were not transferrable, and we would have to start
22 over again and apply for the permits from the
23 beginning rather than transfer them.**

**PAGES 41-196
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1 **modifications that are needed at the facility**
2 **are -- are completed.**

3 Q. How about governmental approvals with
4 respect to any permits?

5 A. **All the permits need to be transferred**
6 **to Regenesis.**

7 Q. All right. But I believe you testified
8 previously that the permit shield concept is -- is
9 standing in the way of a transfer at this point?

10 A. **That's correct.**

11 Q. And what will remove that impediment?

12 A. **The issuance of the renewals.**

13 Q. And this is true in the air context, is
14 that right?

15 A. **That's correct.**

16 Q. And is it true in the water discharge
17 context?

18 A. **That's correct.**

19 Q. And once those two permits are issued
20 by the government, then what will happen?

21 A. **Then those permits will be transferred**
22 **to Regenesis.**

23 MR. HAFFER: I have no further

1 questions at this time, Mr. Chairman.

2 CHAIRMAN WALLS: I hesitate to look to
3 the back row, but, Attorney Roelofs, do you have
4 any more questions?

5 MR. ROELOFS: I do not have anymore
6 questions, but I do want to inform you on the
7 record, with respect to the abutter notification
8 issue, you may have noticed that we did not inquire
9 as to these issues. And the reason is I have been
10 working with respondent's counsel on a stipulation
11 intended to boil that issue down to a legal one.

12 We have a draft stipulation that we
13 have all agreed to. We haven't yet printed it and
14 signed it, but they have represented that we are in
15 agreement. We expect to be filing that tomorrow
16 with respect to the facts.

17 They have also represented -- and I
18 would like them to confirm this -- that they will
19 not be challenging the standing of CFNH to press
20 the notice issue. That will allow me not to have
21 to bring in a CFNH member to confirm that he or she
22 owns one of the properties that abuts the property
23 that did receive notice.

1 MR. HAFFER: Mr. Chairman, we agree
2 that with respect to this proceeding that we're in
3 right now that we are not challenging the CFNH
4 standing issue. We reserve all rights in other
5 proceedings.

6 MR. ROELOFS: And that's understood
7 from our end.

8 CHAIRMAN WALLS: I appreciate that very
9 much, and I will look forward to receiving the
10 stipulation.

11 The town, or REACH?

12 MR. LAJOIE: No questions.

13 CHAIRMAN WALLS: It appears, Mr. Smith
14 that you are excused. Thank you.

15 Attorney Patterson, do you have another
16 witness?

17 MS. PATTERSON: I do. The state calls
18 Trey Dykstra.

19 (Trey Dykstra, sworn)

20 EXAMINATION

21 BY MS. PATTERSON:

22 Q. Could you please state your name and
23 spell both your first and last name for the record?

1 A. **Yes. It's Trey Dykstra. T-R-E-Y,**
2 **D-Y-K-S-T-R-A.**

3 Q. And what is your business address?

4 A. **29 Hazen Drive.**

5 Q. And where do you work?

6 A. **At the New Hampshire Department of**
7 **Environmental Services.**

8 Q. What exactly is your job here?

9 A. **I'm a civil engineer, and I review**
10 **permit applications.**

11 Q. Within which program do you work?

12 A. **Within the Solid Waste Management**
13 **Bureau, which falls in the Waste Management**
14 **Division.**

15 Q. And how long have you been in that
16 position?

17 A. **Approximately two-and-a-half years.**

18 Q. So when did you start?

19 A. **It was about September 1st, 2002.**

20 Q. And what education or experience do you
21 have that qualifies you for that position?

22 A. **I have a bachelor of science degree in**
23 **civil engineering, and a master's degree in civil**

**PAGES 201-228
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<p style="text-align: center;">II-229</p> <p>1 MS. PATTERSON: He said he hadn't seen 2 it before, I believe. 3 MR. LAJOIE: Okay. 4 A. Did you say Exhibit 15? 5 Q. Yes, I did. And if you could look -- 6 actually, it's a little further in. 15-20 up in 7 the upper right-hand corner. It's where the form 8 starts, DES form. Do you recognize that document? 9 A. Yes, I do. 10 Q. And that's the transfer application for 11 the solid waste facility permit, is that right? 12 A. Yes, I believe it is. 13 Q. And I believe Mr. Smith's testimony was 14 that you worked with Linda Sheehy in putting this 15 document together, is that right? 16 A. (Witness nods.) 17 Q. If you could answer out loud. 18 A. Yes. Yes. 19 Q. Okay, thank you. Now, did you read 20 this entire form? 21 A. Yes, I studied it very carefully. 22 Q. Did anyone other than Linda Sheehy work 23 with you on filling this out, or it was pretty much</p>	<p style="text-align: center;">II-231</p> <p>1 Q. So you understood you were making that 2 certification? 3 A. (Witness nods.) 4 MR. HAFFER: You have to answer orally, 5 Mr. Dell'Orfano. 6 A. Yes. 7 MR. SCALFANI: Just a minute, please. 8 Go ahead. 9 Q. And your signature appears in several 10 places on this form, does it not? 11 A. Yes. 12 Q. On page 15-25? 13 A. Yes. 14 Q. You signed this certification with 15 respect to the existing permittee, is that right? 16 A. Yes. 17 Q. And then you also signed the 18 certification with respect to the proposed new 19 permittee, is that right? 20 A. Yes. 21 Q. And the proposed new permittee in this 22 application was Regenesys Corporation, is that 23 right?</p>
<p style="text-align: center;">II-230</p> <p>1 you and Linda? 2 A. Well, I believe that we did seek 3 outside counsel on that issue as well. 4 Q. Now, if you could turn to page 15-24, 5 and section 11 of that form, that's the 6 certification of compliance, compliance report? 7 A. Uh-hum. 8 Q. Do you see that there? Now, you read 9 this section, didn't you? 10 A. Yes, I did. 11 Q. And you understood that if you could 12 not certify to all of the statements that you were 13 asked to certify to, you had the option of 14 submitting a compliance report, is that right? 15 A. Yes, I did. 16 Q. And you understood that you were being 17 asked to certify that no individual or entity 18 holding 10 percent or more of the existing 19 permittee's debt or equity had been convicted of or 20 pled guilty or no contest to any felony in any 21 state or Federal Court during the five years before 22 the date of the application, is that right? 23 A. Yes.</p>	<p style="text-align: center;">II-232</p> <p>1 A. That's correct. 2 Q. And then you also signed under section 3 12 the applicant signature requirement, is that 4 right? 5 A. That is correct. 6 Q. And the statement that you signed in 7 that section read, to the best of my knowledge and 8 belief, the information and material submitted 9 herewith is complete and correct. I understand 10 that any approval granted by DES based on false 11 and/or incomplete information shall be subject to 12 revocation or suspension, and that administrative, 13 civil, or criminal penalties may also apply. 14 Did I read that correctly? 15 A. Yes, you did. 16 Q. And you signed that statement on behalf 17 of both Bio Energy Corporation and Regenesys 18 Corporation? 19 A. That is correct. 20 Q. And they finally, in section 13 under 21 property owner's signature, you signed that section 22 as well, right? 23 A. That is correct.</p>

STATE OF NEW HAMPSHIRE

Regenesi Corporation
1994 Maple Street
West Hopkinton, NH 03229

Re:
SOLID WASTE PERMIT NO. DES-SW-SP-002
BIO ENERGY solid waste FACILITY
WEST HOPKINTON

Hearing held at N.H. Department of Environmental
Services, 29 Hazen Drive, Concord, New Hampshire,
on Wednesday, April 20, 2005, commencing
at 9:36 a.m.

HEARING OFFICER:
Michael J. Walls, Esq.
Department of Environmental Services
Assistant Commissioner

Also present:
Michael Sciafani, Esq.
Legal Assistant, Appeals Clerk

Court Reporter:
Pamela Carle, CCR, RPR
New Hampshire CCR No. 109 (RSA 331-B)

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CHAIRMAN WALLS: Attorney Patterson, I

expect you'll want to recall Mr. Dell'Orfano?

MS. PATTERSON: Yes, thanks.

CHAIRMAN WALLS: You're still under oath,
Mr. Dell'Orfano.

THE WITNESS: Yes.

EXAMINATION

BY MS. PATTERSON:

Q. Good morning, Mr. Dell'Orfano. I wanted
to start out by asking how you would characterize your
relations with the Department of Environmental Services
generally.

A. Relatively very good. I think over the
whole history with the Department of Environmental
Services we've had a very, very cordial and very good
relationship.

Q. Are there specific individuals with whom
you've had direct contact at the agency?

A. Most of my contact has only been with air.
But I can only speak for the air division. And I
really haven't had that much contact recently with
Mr. Gentis, so that's the extent of it.

Q. So no other staff that you've directly

**PAGES 5-12
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1 Q. And it lists a number of companies that
 2 Mr. DiNapoli held some ownership interest in, is that
 3 right?
 4 A. That is correct.
 5 Q. Now, at the time that you spoke with
 6 Mr. DiNapoli about resigning from Bio Energy
 7 Corporation, did you also ask him to resign from any of
 8 these other companies, with the exception of
 9 Bio Energy, LLC, which we talked about?
 10 A. I asked him to be bought out from all of
 11 these companies.
 12 Q. From all of them?
 13 A. I wanted him completely out of my life.
 14 Q. And did he resign from any of them?
 15 A. No. He refused because of his appeal
 16 process at the time.
 17 Q. And, again, it was the same grounds --
 18 A. Yes.
 19 Q. -- on which he refused to resign from LLC,
 20 Bio Energy, LLC?
 21 A. Yes.
 22 Q. Now, after you had this discussion with
 23 Mr. DiNapoli, again the testimony yesterday was that it

1 point in time, and we also had Sheehan, Phinney. A
 2 the time I may have talked to -- I don't know which c
 3 those two people we really discussed in great detai
 4 the July period.
 5 Q. But it was at that period at the end of
 6 July that this intensive review of the transfer --
 7 A. Yes.
 8 Q. -- application took place? And that was
 9 despite the fact that wasn't actually filed with the
 10 agency until --
 11 A. December.
 12 Q. -- December, is that right?
 13 A. That's correct.
 14 Q. Now, you didn't ask DES any questions
 15 about the appropriate way to fill out the form, did
 16 you?
 17 A. No, because upon review of the rules, it
 18 was very clear to me. The rules are very meticulous
 19 and clear as to who can hold a permit and who can't
 20 hold a permit, and that is exactly the situation. I
 21 reviewed the rules, and with the intent of removal of
 22 Mr. DiNapoli completely with any involvement with t
 23 project, the rules were very specific for me.

1 was you and Linda Sheehy who filled out the transfer
 2 application form, is that right?
 3 A. Well, it was a collection of participants.
 4 She and I principally, after my review, yes.
 5 Q. I believe Mr. Smith testified that he was
 6 not directly involved with that process, is that right?
 7 A. I believe you're correct on that. It's a
 8 little sketchy back then, but we were kind of working
 9 on it at the time, at different points in time.
 10 Q. Other than Linda Sheehy, who else worked
 11 on it?
 12 A. Well, as I mentioned yesterday, I worked
 13 with counsel on this to make sure this was right and
 14 that was right.
 15 Q. And you again reviewed the language very
 16 carefully, not only on the form, but on your answers to
 17 the form?
 18 A. Yes.
 19 Q. And the legal counsel that you worked
 20 with, that would be your present legal counsel, is that
 21 right? I know you had testified that you had switched
 22 legal counsel at some point?
 23 A. Well, we had Brown, Olson & Willson at one

1 Q. So you felt that the rules were clear
 2 enough that you didn't have to consult with DES?
 3 A. That's correct. If there was something
 4 that wasn't clear in the rules, I definitely would have
 5 talked with them.
 6 Q. And your understanding in submitting those
 7 forms was that Mr. DiNapoli would not be completing a
 8 personal history disclosure form in conjunction with
 9 that application, is that right?
 10 A. Yes. There's no reason for him, because
 11 at the time, the restructuring of the business model
 12 made him only a unit holder in a company that owne
 13 property.
 14 Q. Now, have you ever had occasion to consult
 15 with the Department of Environmental Services about the
 16 appropriate way to fill out a form with respect to a
 17 permit?
 18 A. No.
 19 Q. Have you ever asked anyone to do that on
 20 your behalf?
 21 A. I -- I think that -- I can't ask -- I
 22 think if I sought for legal counsel in certain cases,
 23 then they would have done what they would have do

1 didn't ask them to go directly to the agency and ask
2 any questions.

3 Q. Did you have any discussion of having
4 legal counsel perhaps, you know, through anonymous
5 inquiry --

6 A. No.

7 Q. -- talk with the agency about this issue?

8 A. I don't recall them doing.

9 Q. So that did not occur, and you don't
10 recall there being --

11 A. No.

12 Q. -- any discussion of it? I believe
13 Mr. Smith testified yesterday that the decision about
14 how to handle the situation with the conviction was
15 made by you, not by him, is that right?

16 A. That's correct.

17 Q. And Mr. Smith was not substantially
18 involved with drafting that transfer application until
19 the time came to send it in to DES, is that correct?

20 A. I believe so.

21 Q. If you could take a look at Exhibit 14 in
22 the white binder, please. And I'll ask whether you've
23 seen this document before.

1 on May 28th, 2002. The owners and managers of
2 Regenesi Corporation are these same four people I
3 have been reviewed for Bio Energy Corporation.

4 Did I read that correctly?

5 A. Yes, you did.

6 Q. Did you have any involvement in drafting
7 that language?

8 A. I don't -- no, I did not.

9 Q. To the best of your knowledge, did
10 Mr. Smith draft that language?

11 A. I don't know. I assume he did. His
12 letter -- I assume he did because he signed it. So
13 of these trans -- a lot of the transmittal forms and
14 those types of things I was not really involved with.

15 Q. But you agree that that letter does not
16 mention Mr. DiNapoli?

17 A. That's correct.

18 Q. And it creates the impression that this is
19 a routine and straightforward matter, would you agree
20 with that?

21 A. Would you repeat what you stated?

22 Q. This language that I just read creates the
23 impression that this is a routine and straightforward

1 A. Only in the context of reviewing some of
2 the documents that -- that were prepared for this --
3 this hearing.

4 Q. So you were not involved in the
5 drafting -- the letter -- what is this document, it's a
6 letter that Harry Smith sent to the Attorney General's
7 office?

8 A. I believe so.

9 Q. Notifying the office of a need for a
10 background investigation, is that right?

11 A. Yes.

12 Q. So you did not see this letter before it
13 was sent, is that right?

14 A. I can't recall. I honestly don't. I've
15 seen so many pieces of paper over the last three years,
16 I can't recall if I saw this one.

17 Q. If you look at page 2 of the letter, the
18 first paragraph there reads as follows: Lastly, please
19 note that the Attorney General's office has recently
20 reviewed personal history disclosure forms for Msrs.
21 Dell'Orfano, Smith, O'Neil, and Ms. Sheehy in
22 conjunction with the solid waste standard permit
23 application for Bio Energy Corporation that was issued

1 matter, is that correct?

2 A. I don't know how to answer that question.
3 I honestly don't know. I don't know what is routine
4 all in the agency's involvement with these type of
5 things. I sat here yesterday and the day before
6 learning about how the interactions of the agency
7 place, so I honestly can't answer the question whether
8 routine back then.

9 Q. But certainly it does indicate that these
10 individuals have recently been investigated, is that
11 right?

12 A. Yes. In fact, I assume that even
13 Mr. DiNapoli was investigated as well. I made that
14 assumption as well.

15 Q. You made the assumption that Mr. DiNapoli
16 was investigated in connection with the transfer
17 application?

18 A. In each and every transaction, yes, I made
19 the assumption the agency would do that.

20 Q. But you knew he was not filling out the
21 forms, is that correct?

22 A. It was told to the agency that he was not
23 involved at this point in time with Bio Energy

**PAGES 21-68
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1 Q. And at that time you were president,
2 secretary and director, correct?
3 A. Yes.
4 Q. And Anthony DiNapoli acted as treasurer
5 and director of that corporation, correct?
6 A. Yes.
7 Q. And Harry Smith was vice president of
8 operations, right?
9 A. Yes.
10 Q. And you have come to learn that on March
11 25, 2002, Antonio DiNapoli was convicted of felony
12 witness tampering by a New Hampshire jury, correct?
13 A. No.
14 Q. Not that you learned it on that date, but
15 that you have now learned that on March 25, 2002,
16 Mr. DiNapoli had been convicted?
17 A. Correct.
18 Q. And on that same date, that is March 25th,
19 2002, Antonio DiNapoli was a director, officer and
20 50 percent shareholder in Bio Energy Corporation,
21 right?
22 A. Yes.
23 Q. And you would agree with me that had you

1 filed an application form to transfer a solid waste
2 management facility permit from Bio Energy Corporation
3 to Bio Energy, LLC on March 25th, 2002, you would have
4 been required to disclose Mr. DiNapoli's criminal
5 conviction, is that correct?
6 A. Or do a compliance report. Yes.
7 Q. In fact, you would agree that at least up
8 until August 29, 2002 when Mr. DiNapoli turned in his
9 shares of Bio Energy Corp., you would still have had to
10 disclose Mr. DiNapoli's felony conviction, since he was
11 a 50 percent owner of Bio Energy Corp., is that
12 correct?
13 A. Prior to August 29th?
14 Q. Yes.
15 A. Yes.
16 Q. Now, did you tell us yesterday that you
17 had a lawyer help you fill out that form?
18 A. Yes.
19 Q. And you can't tell us which lawyer that
20 was?
21 A. Bob Cheney.
22 Q. Oh, so you recall that now, that Bob
23 Cheney actually helped you review and -- that form?

1 A. Well, I would say that early on it was
2 Brown, Olson and Wilson. And the form you're referring
3 to, may I ask again, what form? The transfer form?
4 Q. This is the transfer form.
5 A. It was checked by counsel.
6 Q. Mr. Cheney?
7 A. Yes.
8 Q. Attorney Cheney, who's sitting right here?
9 A. Yes.
10 Q. And he looked it over before you signed
11 it?
12 A. I believe so.
13 Q. And he told you it was okay?
14 MR. HAFFER: Well, I'll object to
15 attorney-client privilege.
16 MR. LAJOIE: Well, he's waived the
17 privilege.
18 MR. HAFFER: He hasn't mentioned any
19 communications. He's identified who his counsel was,
20 and you asked him what he saw his counsel do, but he
21 has not testified about communications, and I object to
22 communications.
23 CHAIRMAN WALLS: Sustained.

1 Q. After -- you said that Mr. Cheney did look
2 at the form, is that correct?
3 A. Yes.
4 Q. Did you sign the form after he looked at
5 it?
6 A. Yes.
7 Q. Did you make any changes after Attorney
8 Cheney looked at the form?
9 A. No.
10 Q. It was completed before Mr. Cheney looked
11 at the form, is that correct?
12 A. I believe, yes.
13 Q. But you understand that when you sign a
14 certification on a form like that that you take
15 responsibility for it, is that correct?
16 A. Yes.
17 Q. When did you turn in your shares of
18 Bio Energy Corp.?
19 A. I have not.
20 Q. You have not? The company was dissolved
21 on August 30th, 2002, correct?
22 A. I'm still winding up.
23 Q. Okay, we'll talk about when the winding up